TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 104.

M. B. JOHNSON AND WILLIAM CHANDLER, PLAINTIFFS IN ERROR,

vs.

B. T. COLLIER.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ALABAMA.

FILED JULY 22, 1912.

(21,770.)

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INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JULY 20, 1911.

7 Div., 144.

1 M. B. JOHNSON and WM. CHANDLER
vs.
B. T. COLLIER.

Appeal from Gadsden City Court.

Organization of the Court.

THE STATE OF ALABAMA,
Etowah County:

Be it remembered that a regular term of the City Court of Gadsden was begun and held for the County of Etowah at the Court House thereof in the City of Gadsden on the third (3rd) Monday twenty-first (21st) day of January 1907, time and place appointed by law for holding said term of said Court. Present and presiding the Honorable John H. Disque, Judge of said Court, also present Woodson J. Martin, Esq., Solicitor for the County of Etowah, James T. Brooks, Clerk of said Court and B. M. Pike, Sheriff of Etowah County. Said Court was opened in due form of law at the hour of Nine (9) O'clock, A. M. this day, when the following proceedings were had and done.

Summons and Complaint.

City Court of Gadsden.

THE STATE OF ALABAMA,
Etowah County:

To any Sheriff of the State of Alabama, Greeting:

You are hereby commanded to summon William Chandler and M. B. Johnson, to appear before the City Court of Gadsden in and for said County, at the place of holding the same within thirty days from the service of this summons and complaint, then and there to answer plead or demur to the complaint hereto annexed of B. T. Collier. You are hereby required to execute this process instanter and return the same immediately upon the execution thereof. Witnsss my hand this the 8th day of August 1906.

JAMES T. BROOKS, *Clerk.*

Complaint.

B. T. COLLIER
vs.
WILLIAM CHANDLER and M. B. JOHNSON.

2 The plaintiff claims of the defendants Five Thousand Dollars for wrongfully taking the following goods and chattels,

the property of the plaintiff. One restaurant outfit consisting of twenty dining tables, 62 chairs, 4 rocking chairs, 3 side tables, dishes, knives, forks, spoons, cups, saucers, glasses, sugar-bowls, paper boxes, salt stands, etc., 144 napkins, tables, clothes and towels, 1 range and fixtures, 1 dish rack, 1 sideboard, 2 ice boxes, 1 china tea set, 1 hall rack, 1 coat rack, 5 wall glasses, 1 coffee urn, 5 coffee pots, 3 large coffee pots, 1 tea pot, 19 cans baking powders, 35 cans corn, 5 boxes cake, 2 cooking safes, 8 stools, 1 office chair, 1 show case, 1 cash register, 4 boxes cigars, 11 large pictures, 8 small pictures, 1 singer sewing machine, 1 settee, 5 sofa pillows, 14 bed steads, 32 pillows, 28 mattresses, 24 quilts, 40 sheets, 14 bed springs, 1 cot and mattress, 5 dressers, 1 book case, 1 leather couch, 1 wardrobe, 4 wash stands, 2 center tables, 1 barrel of vinegar, 1 keg catsup, 3 artificial ferns, 15 jars flowers, 2 hat racks, 3 electric fans, 90 square yards linolium, wash basin and plumbing fixtures, hot water tank, 1 dish trough, 1000 feet of lumber, 200 yards of matting, five rugs, 7 wash bowls, and 7 water pitchers.

2. The plaintiff claims of the defendants Five Thousand dollars damages for wrongfully taking the following goods and chattels the property of the plaintiff, viz: the goods and chattels mentioned and described in the paper hereto attached marked exhibit "A" and made a part of this count of his complaint. 4 lace curtains, 24 pictures, 5 hat racks, 1 hat rack, 3 hat racks, 1 sewing machine, 2 rocking chairs, 1 porch chair, 1 office chair, 2 stools, 51 dining chairs, 5 dining tables, 11 small tables, 3 electric fans, 1 show case, 1 cash register, 7 boxes cigars, 1 office railing, 7 small tables, 1 rubber tree, 1 rubber pot plant, 4 cuspidors, 90 square yards linolium, 1 waste basket, 1 case matches, 3 window shades, 1 business sign, 1 kitchen cabinet, 1 side board, 2 statuett-s, 11 vases, 7 trays, 1 ice box, 2 water coolers, 1 coffee urn, 3 boxes cakes, 1 box tea, 3 buckets, 1 dresser, 2 brooms, 1 basket, 1 box ice, 1 cupboard, 15 sacks salt, 24 cans corn, 7 boxes soda, 20 cans baking powder, 7 glass dishes, 4 coffee pots, 1 barrel vinegar, 2 gallows worcester sauce, 4 jugs, ¼ case gold 3 dust, 1 cupboard safe, 2 kitchen yables, 1 marble slab, 3 meat saws, 1 kitchen range, 9 stove pans, ¾ sa-ks salt, 7 skillets, 4 stew pans, 2 coffee pots, 15 pie pans, 1 pair scales, 1 heating stove, 1 step ladder, ½ cord stove wood, 2 mops, 3 dish pans, 3 butcher knives, 3 sacks flour, 7 boilers, 12 pans, 85 tablespoons, 62 teaspoons, 65 knives, 62 forks, 100 water glasses, 250 dinner plates, 75 ice cream saucers, 30 meat plates, 34 individual butter, 10 egg cups, 3 cake stands, 93 coffee cups, 93 saucers, 21 wine glasses, 50 glass pickle dishes, 250 individual dishes, 350 knapkins, 30 towels, 5 bed spreads, 27 sheets, 30 pillow cases, 75 table cloths, 2 screen doors, 10 oak beds, 4 iron beds, 14 bed springs, 27 mattresses, 30 pillows, 24 comforts, 14 blankets, 40 sheets, 5 dressers, 2 tables, 9 chairs, 5 washstands, 6 lamps, 7 bowls, 7 pitchers, 1 couch, 3 trunks, 2 rocking chairs, 1 large table, 5 pictures, 150 yards of matting, 2 dressers, 2 washstands, 2 bowls and pitchers, 1 rocker, 1000 feet lumber.

GOODHUE AND BLACKWOOD,
BILBRO, INZER & STEPHENS,
BUTCHER & STYLES,
Attorneys for Plaintiff.

A jury is demanded in the trial of this case and the $4.00 jury fee is herewith deposited. G. & B., B. I. & S., B. & S. Att'ys for Pl'ff.

Filed this 8th day of August 1906.
JAMES T. BROOKS, *Clerk.*

We hereby accept legal service of the within summons and complaint and waive service of the same by the Coroner. This August 8th, 1906.
GEO. D. MOTLEY,
Att'y for M. B. Johnson & Wm. Chandler

Defendants' Pleas.

In the City Court of Gadsden.

B. T. COLLIER
vs.
M. B. JOHNSON & WM. CHANDLER.

And now comes the defendants and for answer to the complaint separately and severally says:

1st. The defendant- for answer to the complaint sayeth they are not guilty of the matters alleged thereif.

2nd. For further answer to said complaint they say that on
4 the 9th day of April 1906. M. B. Johnson, as executor of the estate of Thos. L. Johnson, deceased, recovered judgment in the City Court of Gadsden, a Court of competent jurisdiction against B. T. Collier the plaintiff in this case for the sum of eight hundred and sixty five dollars besides costs of suit for money won at a wager from Thos. L. Johnson, deceased, by B. T. Collier the plaintiff in this suit, and that on the 18th day of July 1906, the Clerk of the City Court of Gadsden, issued execution on the above stated judgment against said B. T. Collier and placed the same in the hands of Wm. Chandler, who is Sheriff of Etowah County and that by virtue of said execution, he levied upon the property sued for on the 18th day of July, 1906, and that on the 30th day of July 1906, he sold said property in satisfaction of said judgment.

3rd. And for further answer to said complaint the defendants saith that the property in controversy was levied upon and sold by the defendant Wm. Chandler as Sheriff under an execution issued on a judgment rendered by the City Court of Gadsden, against B. T. Collier plaintiff in this case, and that said City Court of Gadsden, is a Court of competent jurisdiction.

4th. And for further answer to said Complaint the defendants saith that M. B. Johnson, as executor of the estate of Thos. L. Johnson, deceased, recovered judgment against said B. T. Collier on the 9th day of April 1906 for $865.00 for money won by said B. T. Collier from said Thos. L. Johnson, deceased, on a wager, in the City Court of Gadsden, a Court of competent jurisdiction, and that on the 18th day of July 1906, an execution was issued

on said judgment and placed in the hands of Wm. Chandler, as Sheriff of Etowah County, and which was levied by him as said Sheriff on the property alleged to have been converted by the defendants as the property of the said B. T. Collier and that after advertising the same as required by law, he sold the same at public outcry to the highest bidder on July 30th, 1906, to satisfy said judgment and execution and that at said sale M. B. Johnson became the purchaser of said property at and for the sum of six hundred and fifty dollars which defendants aver was a fair value for said property.

5 5th. Defendants for further answer to said complaint saith that on the 20th day of July 1906, the plaintiff filed a petition in bankruptcy and filed schedule of property alleged to have been converted by the defendants in the bankrupt Court as assets of his estate and that said matter is still pending in said bankrupt Court and that said property has never been released by said Court or set apart to the plaintiff in this suit as exempt to him but is in gremio legis.

6th. And for further answer to this complaint the defendants saith that said property was seized by the defendant Wm. Chandler, as Sheriff, under and by virtue of an execution issued on a judgment rendered in the City Court of Gadsden, a Court of Competent jurisdiction, against said B. T. Collier in favor of M. B. Johnson as executor of the estate of Thos. L. Johnson deceased.

7th. The defendants for further answer to said complaint saith that the plaintiff in this suit, B. T. Collier, on the 29th day of July 1906, filed a voluntary petition of bankruptcy in the United States District Court, of Eastern Division of the Northern District of Alabama, a Court of competent jurisdiction and that the property alleged to have been converted by the defendants was scheduled in said Court as assets of the estate of the said B. T. Collier, and (add) that said matter is still pending in said Court and that said property is still under the jurisdiction and protection of said United States Court.

8th. The defendants for further answer to said complaint saith that M. B. Johnson one of the defendants in this case has paid off and discharged a lien for rent on the property sued for.

GEO. D. MOTLEY,
Attorney for Defendants.

Filed in office this the 5th day of Sept. 1906.
JAMES T. BROOKS, *Clerk.*

Plaintiff's Demurrer to Pleas 2-3-4-5-6-7-8.

In the City Court of Gadsden.

B. T. COLLIER
vs.
WILLIAM CHANDLER & M. B. JOHNSON.

Comes the plaintiff and demurs to plea No. 2 in above
6 stated cause on the following grounds:

1. Said plea fails to show that the defendant William Chandler gave notice of the sale as required by law.

2. Said plea fails to show that the property levied on was subject to the execution in the hands of the Sheriff.

3. Said plea fails to substantially set out the execution so that the Court may determine whether or not it authorized the seizure and sale of the property.

4. Said plea fails to show any return of the execution and any excuse for the absence of the return.

And plaintiff demurs separately to the third, fourth plea on the same grounds above assigned to the second.

And plaintiff demurs to the fifth plea on the following grounds:

1. Said fifth plea fails to aver or show that any trustee in bankruptcy has been appointed.

2. The averment of said plea to the effect that plaintiff filed a petition in Bankruptcy and filed schedule of property and that the matter is still pending in Bankrupt Court and that said property has never been released by said Court or set apart to plaintiff afford no jurisdiction to the defendants for the trespass which is averred in the complaint and not denied in the plea.

3. The fact that a petition has been filed in Bankruptcy and other proceedings had as averred in said plea do not constitute a bar to a suit brought for the trespass alleged in the complaint.

And plaintiff demurs to the sixth plea on the same grounds above assigned to the second, and also on the further grounds that said sixth plea fails to show a sale of said property under said execution and also fails to show any justification for the continued holding of the property if no sale was made.

And plaintiff demurs to the seventh plea on the same grounds above assigned to the fifth plea.

And the plaintiff demurs to the eighth plea on the following grounds:

1. The fact that M. B. Johnson has paid off and discharged a lien for rent on property sued for constitutes no justification whatever for the wrongful taking of the goods alleged in the complaint
7 and not denied in the plea.

GOODHUE & BLACKWOOD,
Attorneys for Plaintiff.

Filed this 29th Oct. 1906.

JAMES T. BROOKS, *Clerk.*

Order of the Court on Demurrer.

B. T. COLLIER
vs.
M. B. JOHNSON & WILLIAM CHANDLER.

On this the 12th day of November 1906 come the parties by Attorneys, and the plaintiff demurs to defendant's pleas upon the grounds specifically set forth in said demurrer, and upon due consideration it is ordered and adjudged by the Court that said demurrer as to plea 4 be and the same is hereby overruled, and further that said demurrer to remaining pleas be and the same is hereby sustained and defendant granted ten days in which to file additional pleas.

Amended Pleas.

B. T. COLLIER
vs.
WM. CHANDLER & M. B. JOHNSON.

And now comes the defendants and by leave of the Court first had and obtained, files the following additional pleas, number 9-10-11-12-13-14-15 and 16, towit:

9th. For further answer to said complaint they say that on the 9th day of April 1906, M. B. Johnson as executor of the estate of Thos. L. Johnson, deceased, recovered judgment in the City Court of Gadsden, a Court of competent jurisdiction against B. T. Collier, the plaintiff in this case for the sum of Eight hundred and sixty-five dollars besides costs of suit, for money won at a wager from Thos. L. Johnson, deceased, by B. T. Collier the plaintiff in this suit, and that on the 18th day of July 1906, the Clerk of the City Court of Gadsden issued execution on the above judgment against said B. T. Collier and placed the same in the hands of Wm. Chandler, who is Sheriff of Etowah County, and that by virtue of said execu-
8 tion, he levied upon the property sued for on the 18th day of July, 1906, and after advertising the same as required by law, he did on the 30th day of July, 1906, sell said property in satisfaction of said judgment.

10. Defendants for further answer to said complaint saith that on the 20th day of July 1906, the plaintiff filed a petition in bankruptcy and filed schedule of property alleged to have been converted by the defendants in the bankrupt Court as assets of his estate, and that the said B. T. Collier was regularly declared and adjudged to be a bankrupt by the District Court of the United States for the Eastern Division of the Northern District of Alabama, and that said matter is still pending in said bankrupt Court and that said property has never been released by said Court or set apart to the plaintiff in this suit as exempt to him but is in gremio legis.

11th. And for further answer to this complaint defendants saith that said property was seized by the defendant, Wm. Chandler, as Sheriff under and by virtue of the execution issued on a judgment rendered by the City Court of Gadsden a Court of competent jurisdiction against said B. T. Collier in favor of M. B. Johnson as executor of the estate of Thos. L. Johnson, deceased, and that after advertising said property as required by law, the same was sold to satisfy said judgment and execution.

12th. The defendants for further answer to said complaint saith that the plaintiff in this suit, B. T. Collier, on the 20th day of July 1906, filed a voluntary petition of bankruptcy in the United States District Court, of Eastern Division of the Northern District of Alabama, a Court of competent jurisdiction, and that the property alleged to have been converted by the defendants was scheduled in said Court as assets of the estate of the said B. T. Collier, and that said B. T. Collier was duly adjudged to be a bankrupt by said Court and that said matter is still pending in said Court and that said

property is still under the jurisdiction and protection of the said United States Court.

13th The defendants for further answer to said complaint saith that M. B. Johnson, one of the defendants in this case has paid off and discharged a lien for rent on the property sued for in the sum of One hundred and fifty dollars which defendants offer to set off or recoup against the claim of plaintiff.

14th. And the defendants for further answer to the said complaint saith that the property in controversy was levied upon and sold by the Sheriff after due advertisement was made as provided by law, under and by virtue of a judgment and execution against B. T. Collier, the plaintiff, in this suit, issued from the City Court of Gadsden, by Wm. Chandler, as Sheriff of Etowah County, and that a part of the purchase money was used for the purpose of discharging a lien on the property in controversy which was due for rent which plaintiff had not paid or tendered to defendants in this suit.

15th. The defendants for further answer to said complaint saith that on the 18th day of July 1906 the plaintiff sold the property in controversy to Mrs. Rebecca Lewis and delivered possession to her, and defendants aver that she is still in possession of same.

16th. The defendants for further answer to said complaint saith that on towit: the 18th day of July 1906, the plaintiff contracted with Mrs. R. W. Lewis for the sale of the property in controversy by the plaintiff to the said Mrs. R. W. Lewis and then and there put Mrs. R. W. Lewis in possession with the express provision that the said Mrs. Lewis should remain in control and custody of said property until said plaintiff consummated the contract entered into, and defendants aver that said Mrs. R. W. Lewis is still in possession and control and custody of said property and has been since said 18th day of July 1906.

GEO. D. MOTLEY,
Attorney for Defendants.

Filed in office this Nov. 13, 1906.
JAMES T. BROOKS, *Clerk.*

Plaintiff's Demurrer to Pleas 9-10-11-12-13-14-15 & 16.

In the City Court of Gadsden.

B. T. COLLIER
vs.
WM. CHANDLER & M. B. JOHNSON.

Comes the plaintiff and demurs to plea No. 9 in above stated cause on the following grounds:

1. Said plea fails to show that defendant Wm. Chandler gave notice of the sale as required by law.

2. Said plea fails to show that the property levied on was subject to the execution in the hands of the Sheriff.

3. Said plea fails to substantially set out the execution so that the Court may determine whether or not it authorized the seizure and sale of the property.

4. Said plea fails to show any return of the execution or any excuse for the absence of the return.

And plaintiff demurs to the tenth plea on the following grounds towit:

1. Said tenth plea fails to show that any trustee in bankruptcy had been appointed.

2. The averment of said plea to the effect that plaintiff filed a petition in Bankruptcy, filed schedule of his property and that Collier was declared and adjudged to be a Bankrupt and that said matter is still pending in Bankrupt Court, and that said property has never been released by said Court or set apart to the plaintiff as exempt afford no justification to the defendants for the trespass which is averred in the complaint and not denied in the plea.

3. The fact that a petition has been filed in Bankruptcy and other proceedings had as averred in said plea do not constitute a bar to a suit brought for the trespass alleged in the complaint.

And plaintiff demurs to the 11th plea on the same grounds above assigned to the ninth.

And plaintiff demurs to the twelfth plea on the same grounds above assigned to the tenth.

And plaintiff demurs to the thirteenth plea on the following grounds, towit:

1. Said plea professes to answer the whole complaint and in fact only answers a part thereof.

2. The fact that M. B. Johnson has paid off and discharged said lien for rent can not be plead either as set off or recoupment against the present action.

3. Because the present action is an action of tort and no set off or recoupment can be plead against it.

4. Because the facts which constituted the claim paid off by Johnson a lien for rent are not stated.

11 And plaintiff demurs to the fourteenth plea on the same grounds above assigned to the thirteenth, and also on the same grounds assigned to the ninth plea.

And plaintiff demurs to the fifteenth plea on the ground that the facts stated therein constitute no justification whatever for the trespass alleged in the complaint and not denied by the plea.

2. Because everything that is alleged in the fifteenth plea may be taken advantage of under the general issue.

And plaintiff demurs to the sixteenth plea on the same grounds above assigned to the fifteenth plea.

GOODHUE & BLACKFORD,
Attorneys for Plaintiff.

Filed in office this Feb'y 25th, 1907.

JAMES T. BROOKS, *Clerk.*

Order of the Court on Demurrer.

B. T. COLLIER
vs.
M. B. JOHNSON & WILLIAM CHANDLER.

On this the 27th day of March, 1907, come the parties by Attorneys and the plaintiff demurs to defendant's pleas upon the grounds

specifically set forth in said demurrer, and upon due consideration it is ordered and adjudged by the Court that said demurrer as to plea number 9, be and the same is hereby overruled, and further that said demurrer as to remaining pleas 10-11-12-13-14-15 & 16 be and the same is hereby sustained.

Leave to Plaintiff to File Additional Counts Nos. 3 & 4.

B. T. COLLIER
vs.
M. B. JOHNSON & WM. CHANDLER.

On this the 5th day of April 1907 come the parties by Attorneys, and upon motion, Plaintiff is granted leave by the Court to file additional counts Nos. 3 & 4.

Plaintiff's Amended Complaint.

In the City Court of Gadsden.

B. T. COLLIER
vs.
M. B. JOHNSON & WM. CHANDLER.

12 By leave of the Court first had and obtained the plaintiff amends his complaint by adding thereto the following counts:

3. The plaintiff claims of the defendant the sum of Five Thousand dollars as damages on the following state of facts. On and prior to the — day of July, 1906, plaintiff was the owner and in possession of the goods and chattels mentioned and described in exhibit "A," to the second count of this complaint on said — day of July, 1906, plaintiff delivered possession of said property to one Rebecca Lewis under the terms of an agreement in writing, a copy of which is hereto attached marked Exhibit "B," and made a part of this count of plaintiff's complaint; and plaintiff avers that while said property was in the control and custody of said Rebecca Lewis, and before said agreement was consummated by the said Collier getting said property in a condition where he might make a good title thereto, in accordance with the terms of said contract the said defendants Wm. Chandler and M. B. Johnson, wrongfully took the said property from the said Rebecca Lewis and sold the same to the damage of plaintiff, in the sum of Five Thousand Dollars, hence this suit.

4th. The plaintiff claims of the defendants the sum of Five Thousand Dollars as damages on the following state of facts: On and prior to the — day of July, 1906, plaintiff was the owner and in possession of the goods and chattels mentioned and described in Exhibit "A" to the second count of this complaint. On said — day of July, 1906, plaintiff delivered possession of said property to one Rebecca Lewis under the terms of an agreement in writing, a copy of which is attached to the third count of this complaint marked

Exhibit "B" which is also made a part of this count of plaintiff's complaint. And plaintiff avers that while said property was in the control and custody of said Rebecca Lewis and before said agreement was consummated in accordance with the terms of said written contract the said Wm. Chandler who was then and there the Sheriff of Etowah County, Alabama, levied an execution in his hands, a copy of which is hereto attached marked Exhibit "C" and made a part of this count of the complaint, upon the said goods and chattels, and took the same in his possession under said levy.

And plaintiff avers that thereafter he filed with said Wm.
13 Chandler Sheriff his claim of exemptions in writing, a copy of which is hereto attached marked Exhibit "D" and made a part of this count of the complaint; and plaintiff avers that said Wm. Chandler, as Sheriff wholly disregarded said claim of exemptions; that the plaintiff in said execution in no way contested the claims of exemptions, and that the said Wm. Chandler in utter disregard of said claim of exemptions, proceeded to sell and did sell said goods and chattels under said execution to the damage of the plaintiff in the sum of Five Thousand Dollars. And plaintiff avers that defendant M. B. Johnson instigated and procured the said Wm. Chandler to sell said goods and chattels under said execution in disregard of said claim of exemptions. And the plaintiff avers that the judgment of which said execution was based was substantially as follows, towit:

M. B. JOHNSON, as the Executor of the Last Will and Testament of Thos. L. Johnson, deceased,

vs.

B. T. COLLIER.

$865.00.

On this the 9th day of April, 1906, came the parties by Attorneys and the issues being joined thereupon come a jury of good and lawful men, towit: T. W. Morrow and eleven (11) others, who being duly elected empannelled sworn and charged according to law upon their oaths do say "We the jury find the issues in favor of the plaintiff, and we assess the damages in the sum of Eight Hundred and Sixty Five Dollars." It is therefore considered by the Court that the issues are in favor of the plaintiff, and that the plaintiff recover judgment against the defendant for the said sum of Eight Hundred and Sixty Five Dollars, damages so assessed together with the costs of suit and for which let execution issue.

And plaintiff also avers that said judgment was based on a complaint filed in said City Court of Gadsden, a substantial copy of which is hereto attached marked Exhibit "E" and prayed to be taken as a part of this count of the complaint.

GOODHUE & BLACKWOOD,
Att'ys for Plaintiff.

EXHIBIT "B."

STATE OF ALABAMA,
Etowah County:

This memorandum of agreement made and entered into by and between B. T. Collier and Mrs. Rebecca and R. W. Lewis, and W. H. Barnes surety of the said Mrs. Lewis. Witnesseth:

14 1. The said B. T. Collier hereby agrees to sell unto the said Mrs. Lewis, all of the furniture, tableware, kitchen utensils, and other property owned by him and used in connection of the operation of his restaurant on Broad Street in the City of Gadsden, Alabama, and at No. 314 on said Street, a more particular description of said property to be furnished in a bill of sale to be madr on the consummation of this contract, but it is understood that the following property is not embraced in the contract, viz: One wardrobe, one lounge, 5 pictures, 12 Japanese cups and saucers and one beer set, and two statuett-s, the good will of said B. T. Collier in said business, he agreeing in considerationn of the stipulations of said agreement not to run a restaurant in the City of Gadsden, Alabama, for a period of two years from the date hereof.

And this agreement is made upon the consideration of one dollar in hand paid to the said B. T. Collier by the said Mrs. Lewis, the receipt whereof is hereby acknowledged and of the further agreements upon the part of Mrs. Lewis herein after set out.

(2) The said Mrs. Lewis agrees to purchase of the said B. T. Collier the property referred to, at and for the sum of Nine Hundred Dollars, of which said amount $450.00 is to paid in cash upon the consummation of the agreement, and the remainder is to be paid in monthly instalments of $50.00 each, the first payment to be made in 30 days from the date of the consummation of this agreement and the payment of the $450.00 and then $50.00 for each month thereafter, and 30 days apart, for nine months until said monthly instalments have been paid in full; and it is further agreed to pay the said Collier interest on the full purchase price of $900.00 from July 20th, 1906, at the rate of 8% and the said Collier is to further have furnished to him free of charge at said restaurant board and lodging from the present to the time of the payment of the said $450.00 and the instalments mentioned are to be made into notes of the said Mrs. Lewis payable as aforesaid, and the same are to be secured by R. W. Lewis, and a mortgage on the property in question, or other security that may be satisfactory to said Collier.

15 3. Said Collier agrees to sell to the said Mrs. Lewis said property and privileges, at and for the sum, and on the conditions and terms mentioned.

4. It is mutually understood that this agreement to convey is to be consummated upon the part of all parties immediately upon the said Collier getting said property in a condition where he may make a good title thereto, whether by terminating the litigation involving it or otherwise.

5. It is further mutually understood that for the present and until this agreement is consummated, if said Collier gets said prop-

erty in condition to consummate it, the property mentioned and the restaurant mentioned, as far as said Collier is concerned, is to remain in control and custody of said Lewis, but said Collier is not to be held responsible for delays and failures in clearing up the title to said property, said Lewis paying all operating expenses including rents, lights, water, etc., but assuming no debts contracted prior to July 19th, 1906.

Interlineations and erasures made before execution, and this agreement is executed on duplicate on the date mentioned below, said Collier and said Mrs. Lewis each retaining copy of same.

Given under the hands and seals of each party July —, 1906.

MRS. R. W. LEWIS. [SEAL.]
W. H. BARNES. [SEAL.]
R. W. LEWIS. [SEAL.]
B. T. COLLIER. [SEAL.]

Attest:
JNO. A. INZER.

EXHIBIT "D."

THE STATE OF ALABAMA,
Etowah County:

Before me N. L. Green, a Notary Public in and for said County personally appeared B. T. Collier, who being duly sworn, doth depose and say that he is a bona fide resident citizen of the County of Etowah, of said State, and that he hereby makes known and declares under oath, that he was adjudicated a bankrupt in the United States Court, Eastern Division of the Northern District of Alabama at Anniston, Alabama, on the 20th day of July, 1906, that he claimed the personal property hereinafter set forth as exempt
16 to him on the filing of his said petition for adjudication in bankruptcy as aforesaid, and that without waiving any right he acquired by filing such claim of exemptions in bankruptcy, he has here selected and claimed as exempt to him, under the constitution and laws of the State of Alabama the following described personal property, levied on by William Chandler as Sheriff of Etowah County on the 18th day of July, 1906, on an execution issued on said date out of the City Court of Gadsden, on a judgment rendered by said Court on the 9th day of April, 1906, against B. T. Collier and in favor of M. B. Johnson as Extr. T. L. Johnson deceased namely: One restaurant out-fit consisting of 20 dining tables, 62 chairs, 4 rocking chairs, 6 side tables, dishes, knives, forks, spoons, cups, saucers, glasses, sugar bowls, pepper boxes, salt stands, etc., 144 knapkins, tables clothes, and towels, 1 range — fixtures, 1 dish rack, one side board, two ice boxes, 1 china tea set, 1 hall rack, 1 coat rack, 5 wall glasses, 1 coffee urn, 5 coffee pots, 3 large coffee pots, 1 tea pot, 19 cans baking powder, 36 cans corn, 5 boxes coke, 75#, 2 cooking safes, 8 stools, 1 office chair, 1 show case, 1 cash register, 4 boxes cigars, 11 large pictures, 8 small pictures, 1 singer sewing machine, 1 settee, 6 soffa pillows, 14 bed-steads, pillows, mattresses,

quilts, sheets, springs, 1 cot and mattress, 5 dressers, 1 book case, 1 leather couch, 1 ward robe, 4 wash stands, 2 chamber tables, 1 barrel of vinegar, 1 keg catsup, 3 artificial ferns, 15 jars of flowers, two hat racks. This includes entire outfit now in said restaurant owned by B. T. Collier in Gadsden, Alabama, all of which said personal property as set forth above and which is of value less than one thousand dollars, is hereby claimed as exempt from levy and sale for the collection of any debt contracted by him under the constitution and laws of the State of Alabama, that the above judgment on which said execution was issued was on a debt contracted by claimant since April 23, 1873, the said property claimed as exempt being more particularly described in the schedule which follows having a total valuation of six hundred and sixty eight and 10/100 (668.10) Dollars, the said property hereinafter described being its identical property levied on under said execution.

17 *Personal Property.*

4 lace curtains	.02¢	$1.00
24 pictures	.40	9.60
5 Hat Racks	2.50	12.00
1 Hat Rack	2.00	2.00
1 Hat Rack	1.50	1.50
2 Hat Racks	.25	.50
1 sewing machine	25.00	25.00
2 rocking chairs	1.00	2.00
1 porch chair	1.00	1.00
1 office chair	1.00	1.00
2 stools	.50	1.00
51 dining room chairs	.50	25.50
5 dining tables	3.50	17.50
11 small tables	1.25	13.75
3 electric fans	10.00	30.00
1 show case	4.00	4.00
1 cash register	50.00	50.00
7 boxes cigars	1.50	10.50
1 office railing	2.00	2.00
7 small tables	.50	3.50
1 rubber tree	1.25	1.25
1 rubber pot plant	2.00	2.00
4 cuspidors	.10	.40
Floor covering	12.00	12.00
1 waste basket	.25	.25
Matches	1.50	1.50
3 window shades	.50	1.50
1 sign	.25	.25
1 kitchen cabinet	2.50	2.50
1 side board	20.00	20.00
2 statues	1.00	2.00
11 vases	.10	1.10
7 trays	.10	.70
1 ice box	2.00	2.00

	1 cooler	1.00	1.00
18	1 cooler	1.25	1.25
	1 coffee urn	10.00	10.00
3	boxes cakes	1.50	4.50
1	box tea	5.00	5.00
3	buckets	.10	.30
1	dresser	1.50	1.50
2	brooms	.10	.20
1	basket	.10	.10
1	box ice	2.25	2.25
1	cupboard	.25	.25
15	sacks salt	.04	.60
24	cans corn	per doz. .85¢	1.70
7	boxes soda	.05	.35
20	cans baking powder	.08½	1.70
7	glass dishes	.10	.70
4	coffees	.10	.40
1	barrel vinegar, 25 gal	.15	3.75
2	gal. wo-ster sauce	.60	1.20
4	jugs	.10	.40
¼	box gold dust	1.25	1.25
1	cupboard safe	3.00	3.00
2	kitchen tables	1.00	2.00
1	marble slab	1.00	1.00
3	saws	.25	.75
1	range	40.00	40.00
9	stove pans	.10	.90
¾	sack salt	.25	.25
7	skillets	.10	.70
4	stew pans	.15	.60
2	coffee pots	.20	.40
15	pie pans	.05	.75
1	pr. *sacles*	.50	.50
1	heater	1.00	1.00
1	step ladder	.50	.50
	Stove wood	1.50	1.50
19	2 mops	.05	.10
	2 dish pans	.10	.20
3	butcher knives	.20	.60
3	sacks flour	.65	1.95
7	boilers	.20	1.40
12	pans	.05	.60
85	table spoons	.01	.85
62	tea spoons	.01	.62
65	knives	.04	2.60
62	forks	.03	1.86
100	water glasses	.02	2.00
250	dinner plates	.03	7.50
75	ice cream saucers	.01	.75
30	meat plates	.05	1.50
34	individual butters	.00½	.17
10	egg cups	.05	.50

3 cake stands	.15	.45
93 cups (coffee)	.03	2.79
93 saucers	.02	1.86
21 wine glasses	.02	.42
50 glass pickle dishes	.03	1.50
250 individual dishes	.04	10.00
350 napkins	.04	14.00
30 towels	.05	1.50
3 bed spreads	.35	1.05
27 sheets	.15	4.05
30 cases (pillows)	.08⅓	2.50
75 table clothes	.50	37.50
2 screen doors	1.00	2.00
10 oak beds	2.00	20.00
4 iron beds	2.50	10.00
14 pr. Springs	1.00	14.00
27 mattresses	1.00	27.00
30 pillows	.30	9.00
24 comforts	.35	8.40
14 blankets	.40	5.60
20 40 sheets	.15	6.00
4 dressers	1.25	5.00
1 dresser	5.00	5.00
2 tables	.50	1.00
9 chairs	.50	4.50
5 wash stands	1.00	5.00
6 lamps	.20	1.20
7 bowls	.40	2.80
7 pitchers	.40	2.80
1 couch	10.00	10.00
1 trunk	2.00	2.00
2 trunks	1.00	2.00
2 rocking chairs	1.00	2.00
1 large table	2.00	2.00
5 pictures	.75	3.75
Matting	—	8.00
2 dressers	1.50	3.00
2 wash stands	1.00	2.00
2 bowls	.40	.80
2 pitchers	.40	.80
1 rocker	1.00	1.00
2 beds (Oak)	2.50	5.00
2 mattresses	2.00	4.00
2 sets springs	1.00	2.00
4 pillows	.35	1.40
8 cases (Pillows)	.10	.80
8 sheets	.15	1.20
2 bed spreads	.50	1.00
1 hat rack	3.00	3.00
1 mirror	2.50	2.50
12 napkins	.05	.60

18	knives	.10	1.80
18	forks	.10	1.80
1	walking cane	2.00	2.00
1	watch	3.00	3.00
	1 pistol	4.00	4.00
21	1 hair brush	.19	.10
	1 clothes brush	.15	.15
1	book rack	.75	.75
24	books	.50	12.00
1	foot stool	.50	.50
1	suit case	1.00	1.00
	Total		668.10

(Signed) B. T. COLLIER.

Subscribed and sworn to before me, this 28th day of July, 1906.
N. L. GREEN, *N. P.*

EXHIBIT "E."

Complaint.

THOS. L. JOHNSON
vs.
B. T. COLLIER.

Plaintiff claims of the defendant the sum of seven hundred and sixty dollars due from him for money on or about the 15th day of April 1904, received by the defendant to the use of the plaintiff, which sum of money with the interest thereon is still unpaid.

2. And the plaintiff claims of the defendant the further sum of seven hundred and sixty dollars due from him for money had and received by the defendant for the use of the plaintiff on or about the 15th day of April 1904, which sum of money with the interest thereon is still unpaid.

3. And the plaintiff claims of the defendant the further sum of seven hundred and sixty dollars due from him for money received by the defendant paid and belonging to the plaintiff, which was wagered and lost by the plaintiff on the result of the primary election held in Etowah County on the 11th day of April 1904, under the general laws of Alabama, which sum of money with the interest thereon is still unpaid.

4. And the plaintiff claims of the defendant the further sum of Seven hundred and Sixty dollars due from him for money lost by the plaintiff as a result of a wager on the result of the primary
22 election held in Etowah County on the 11th day of April 1904, under the general laws of Alabama, which said money was won and received by said defendant in this case, which sum of money with the interest thereon is still unpaid.

5. And the plaintiff claims of the defendant the further sum of

Seven Hundred and Sixty Dollars, due from the defendant for money received by him from plaintiff, which said money was won by defendant and lost by the plaintiff on a wager on the result of a primary election under the general laws of Alabama held on the 11th day of April, 1904, in and for Etowah County for Probate Judge, which sum of money with the interest thereon is still unpaid.

(Signed) GEO. D. MOTLEY,
Attorney for Pl'ff.

Filed in office this 5th day of April 1907.
JAMES T. BROOKS, *Clerk.*

In the City Court of Gadsden.

Plaintiff's Replication to Defendant's Pleas.

B. T. COLLIER
vs.
M. B. JOHNSON & WM. CHANDLER.

Comes the plaintiff and for answer to pleas numbered one four and nine denies each and every allegation contained in each of said pleas.

2. And for replication to pleas number four and nine, plaintiff says that after the levy of the execution referred to in said pleas and prior to the sale of said property plaintiff filed with said William Chandler a claim in writing verified by his oath claiming said property exempt to him under such execution describing the said property, and that the said Wm. Chandler, Sheriff entirely disregarded said claim, gave no notice thereof to the plaintiff in execution, his agent or Attorney, and without causing the said claim to be contested in utter disregard of said claim of exemption proceeded to sell and did sell, said property. And Plaintiff avers that the property sold was exempt from levy and sale under the said execution.

3. And for further replication on this behalf to pleas number four and nine plaintiff says that after the levy of the execution referred to in said pleas and prior to the sale of said property plaintiff filed with said Wm. Chandler a claim in writing verified by his oath, a copy of which is attached to the fourth count of his complaint
23 marked exhibit "D" and prayed to be taken as a part of this replication. And plaintiff says that the said Wm. Chandler, Sheriff entirely disregarded said claim, gave no notice thereof to the plaintiff in execution, his agent or Attorney, and without causing the said claim to be contested in utter disregard of said claim of exemptions proceeded to sell, and did sell, said property.

And the plaintiff avers that the judgment on which said execution was based was substantially as follows:

M. B. JOHNSON, as the Executor of the Last Will and Testament of Thos. L. Johnson, Deceased,

vs.

B. T. COLLIER.

$865.00.

On this the 9th day of April 1906, came the parties by Attorneys and the issues being joined, thereupon comes a jury of good and lawful men, towit, T. W. Morrow and eleven others, who being duly elected, empanneled, sworn and charged according to law upon their oaths do say "we the jury find the issues in favor of the plaintiff and we assess the damages in the sum of Eight Hundred and Sixty Five Dollars." It is therefore considered and adjudged by the Court that the issues are in favor of the plaintiff, and that the plaintiff recover judgment against the defendant for the said sum of Eight Hundred and Sixty-five Dollars damages so assessed, together with the costs of suit and for which let execution issue.

And plaintiff avers also that said judgment was based on a complaint filed in said City Court of Gadsden, a substantial copy of which is attached to fourth count of plaintiff's complaint marked exhibit "E" and prayed to be taken as a part of this replication.

GOODHUE & BLACKWOOD,
Attorneys for Plaintiff.

Filed this the 6th day of April 1907.

JAMES T. BROOKS, *Clerk.*

In the City Court of Gadsden.

Defendant's Demurrer to Complaint & Replication.

B. T. COLLIER

vs.

M. B. JOHNSON & WM. CHANDLER.

And now comes the defendant in the above stated cause, and demur to the amended complaint heretofore filed by the plaintiff and numbered three, and assign the following grounds, towit:

1st. Said count shows on its face that the plaintiff is not entitled to the possession of the property alleged to have been taken
24 by the defendants.

2nd. Said count shows that the plaintiff is not entitled to the immediate possession of the property taken by the defendants.

3rd. Said count shows that the said property was in the control and custody of Rebecca Lewis, and not in the control and custody of the plaintiff.

4th. Said count fails to show that the plaintiff was entitled to the immediate possession of said property.

5th. Said count fails to show that the plaintiff was entitled to the immediate control and custody of the property in controversy.

6th. Said count shows that the right of action if any is in Rebecca Lewis and not in the plaintiff.

7th. Said count shows that the plaintiff had parted with the custody and control of said property and does not show the right of plaintiff to the possession of the same.

And the defendant demurs to count number four, and assigns the following grounds of demurre-, towit:

1st. And they assign the same grounds of demurrer above assigned to count number three and the following additional grounds.

2nd. Said count fails to show that the goods claimed was exempt to the plaintiff as against the execution in the defendant's hand.

3rd. Said count fails to show that plaintiff was entitled to his exemptions as against the process held by defendant Chandler.

4th. Said count fails to show that said property was exempt to plaintiff.

5th. Said count does not show or aver that plaintiff was entitled to exemptions against judgment on which execution issued.

6th. Said count fails to show that plaintiff was injured by the disregard of his claim of exemptions.

7th. Said count shows that property in controversy was sold to satisfy a judgment against plaintiff but fails to aver or show that said property was not subject to the judgment and execution in the hands of the defendant.

And the defendant M. B. Johnson demurs separately to said count on the ground

8th. That said count does not set out the facts as to his connection but is the conclusion of the pleader.

And defendants demur to plaintiff's replication two and three to defendants' pleas numbered four and nine separately and severally and assign the same grounds of demurrer herein above assigned to counts number three and four.

GEO. D. MOTLEY,
Attorney for Defendant.

Filed in office this the 23rd day of April 1907.
JAMES T. BROOKS, *Clerk.*

In the City Court of Gadsden.

Defendant's Demurrer to Counts 3 *&* 4 *& Pl'ff's Replication* 4 *&* 5.

B. T. COLLIER
vs.
M. B. JOHNSON & WM. CHANDLER.

And now comes the defendants in the above stated cause, and demur to the amended complaint heretofore filed by the plaintiff and numbered three, and assign the following grounds, towit:

1st. Said count shows on its face that the plaintiff is not entitled to the possession of the property alleged to have been taken by the defendants.

2nd. Said count shows that the plaintiff is not entitled to the immediate possession of the property taken by the defendants.

3rd. Said count shows that the said property was in the control and custody of Rebecca Lewis, and not in the control and custody of the plaintiff.

4th. Said count fails to show that the plaintiff was entitled to the immediate possession of said property.

5th. Said count fails to show that the plaintiff was entitled to the immediate control and custody of the property in controversy.

6th. Said count shows that the right of action if any is in Rebecca Lewis and not in the plaintiff.

7th. Said count shows that the plaintiff had parted with the custody and control of said property and does not show the right of plaintiff to the possession of the same.

8th. Said count shows on its face that the property was subject to the execution.

9th. Said count shows on its face that the plaintiff was not entitled to have these goods set apart as exempt to him as against the judgment of defendant Johnson.

10th. Said count shows on its face that plaintiff was not entitled to exemption as against the execution in the hands of the defendant Chandler.

26 11th. Said count shows on its face that the judgment upon which execution was issued was such judgment as the plaintiff was not entitled to have the property in controversy set apart to him as exempt.

12th. Said count shows on its face that the judgment on which process issued under which the goods in controversy were levied on and sold by defendant Wm. Chandler as Sheriff was such a judgment that plaintiff was not entitled to any exemption.

13th. Said count shows on its face that plaintiff in this case was not injured by the sale of the property in controversy.

And defendants demur to count number four and assign the following grounds of demurrer to wit:

1st. And they assign the same grounds of demurrer above assigned to count number three and additional grounds.

2nd. Said count fails to show that the goods claimed were exempt to the plaintiff as against the execution in the defendants' hand.

3rd. Said count fails to show that the plaintiff was entitled to his exemptions as against the process held by defendant Chandler.

4th. Said count fails to show that said property was exempt to plaintiff.

5th. Said count does not show or aver that plaintiff was entitled to exemptions as against judgment on which execution issued.

6th. Said count fails to show that plaintiff was injured by the disregard of his claim of exemptions.

7th. Said count shows that the property in controversy was sold to satisfy a judgment against plaintiff but fails to aver or show that said property was not subject to the judgment and execution in the hands of the defendant.

And the defendant M. B. Johnson, demurs separately to said count on the ground.

8th. That said count does not set out the facts as to his connection but is the conclusion of the pleader.

And defendants demur to plaintiff's replication number two and three to defendants' pleas number four and nine separately and severally and assign the same grounds of demurrer herein above assigned to counts number three and four.

GEO. D. MOTLEY,
Att'y for Defendants.

Filed in office this the 24th day of April 1907.
JAMES T. BROOKS, *Clerk.*

27 *Order of Court on Demurrer to Counts* 3 *&* 4, *Plaintiff's Amended Complaint and Replications.*

B. T. COLLIER
vs.
M. B. JOHNSON & WM. CHANDLER.

On this the 27th day of April 1907, come the parties by Attorneys and defendants demur to counts 3 & 4 of plaintiff's amended complaint filed April 3rd, 1907, upon the grounds specifically set forth in said demurrer, and upon due consideration it is ordered and adjudged by the court that said demurrer be and the same is hereby overruled and defendants demur to plaintiff's replication 2 & 3 to defendant's pleas 4 & 9, upon the grounds specif-cally set forth in said demurrer, and upon due consideration it is ordered and adjudged by the Court that said demurrer be and the same is hereby overruled.

Defendants' Pleas to Counts 3 *&* 4, *Plaintiff's Amended Complaint.*

In the City Court of Gadsden.

B. T. COLLIER
vs.
WM. CHANDLER & M. B. JOHNSON.

Now comes the defendants in the above stated case and for answer separately and severally to counts No. three and four separately and severally of plaintiff's complaint as amended say:

1st. The defendants for answer to the complaint saith they are not guilty of the matters alleged therein.

2nd. And for further answers to said complaint the defendants saith that, M. B. Johnson, as executor of the estate of Thos. L. Johnson, deceased, recov- judgment against said B. T. Collier on the 9th day of April, 1906, for $865.00 for money won by said B. T. Collier from said T. L. Johnson, deceased, on a wager, in the City Court of Gadsden, a Court of competent jurisdiction, and that on the 18th day of July 1906, an execution was issued on said judgment and placed in the hands of Wm. Chandler as Sheriff of Etowah County, and

which was levied by him as said Sheriff on the property alleged to have been converted by the defendants as the property of the said B. T. Collier and that after advertising the same as required by law, he sold the same as public outcry to the highest bidder on July 30th, to satisfy said judgment and execution and that at said sale M. B. Johnson became the purchaser of said property at and for the sum of Six Hundred and Fifty Dollars which defendants aver was a fair value for said property.

3rd. For further answer to said complaint they say that on the 9th day of April 1906, M. B. Johnson as Executor of the
28 estate of Thos. L. Johnson, deceased, recovered judgment in the City Court of Gadsden, a Court of competent jurisdiction against B. T. Collier, the plaintiff in this case, for the sum of Eight Hundred and Sixty-Five Dollars, besides costs of suit, and that on the 18th day of July the Clerk of the City Court of Gadsden, issued execution on the above judgment against said B. T. Collier and placed the same in the hands of Wm. Chandler, who is Sheriff of Etowah County, and that by virtue of said execution he levied upon the property sued for on the 18th day of July 1906, and after advertising the same as required by law, he did on the 30th day of July, sell said property in satisfaction of said judgment.

4th. Defendants for further answer to said complaint saith, that on the 20th day of July 1906, the plaintiff filed a petition in bankruptcy and filed schedule of property alleged to have been converted by the defendants in the bankrupt Court as assets of his estate, and that the said B. T. Collier was regularly declared and adjudged to be a bankrupt by the District Court of the United States for the Eastern Division of the Northern District of Alabama, and that said matter is still pending in said bankrupt Court and that said property has never been released by said Court or set apart to the plaintiff in this suit as exempt to him but is in gremio legis.

5th. And for further answer to this complaint defendants saith that said property was seized by the defendant, Wm. Chandler, as Sheriff under and by virtue of an execution issued on a judgment rendered by the City Court of Gadsden, a Court of competent jurisdiction, against said B. T. Collier in favor of M. B. Johnson, as executor of the estate of Thos. L. Johnson, deceased, and that after advertising said property as required by law, the same was sold to satisfy said judgment and execution.

6th. The defendants for further answer to said complaint saith that the plaintiff in this suit B. T. Collier, on the 20th day of July 1906, filed a voluntary petition in bankruptcy in the United States District Court of Eastern Division of the Northern District of Alabama, a Court of competent jurisdiction, and that the property alleged to have been converted by the defendants was scheduled in said Court as assets of the estate of the said B. T. Collier, and that said B. T. Collier was duly adjudged a bankrupt by said Court
29 and that said matter is still pending in said Court and that said property is still under the jurisdiction and protection of the United States Court.

7th. The defendants for further answer to said complaint saith

that M. B. Johnson, one of the defendants in this cause has paid off and discharged a lien for rent on the property sued for in the sum of One Hundred and Fifty Dollars which defendants offer to set off or recoup against the claim of plaintiff.

8th. And the defendants for further answer to said complaint saith that the property in controversy was levied upon and sold by the Sheriff after due advertisement was made as provided by law, under and by virtue of a judgment and execution against B. T. Collier, the plaintiff in this suit, issued from the City Court of Gadsden, by Wm. Chandler, as Sheriff of Etowah County, and that a part of the purchase money was used for the purpose of discharging a lien on the property in controversy which was due for rent which plaintiff has not paid or tendered to defendants in this suit.

9th. The defendants for further answer to said complaint saith that on the 18th day of July 1906, the plaintiff sold the property in controversy to Mrs. Rebecca Lewis, and delivered possession to her, and defendants aver that she is still in possession of the same.

10th. The defendants for further answer to said complaint saith that on, towit, the 18th day of July, 1906, the plaintiff contracted with Mrs. R. W. Lewis, for the sale of the property in controversy by the plaintiff to the said Mrs. R. W. Lewis and then and there put Mrs. R. W. Lewis in possession with the express provision that the said Mrs. Lewis should remain in control and custody of said property until said plaintiff concummated the contract entered into and defendants aver that said Mrs. R. W. Lewis is still in possession and control and custody of said property and has been since said 18th day of July 1906.

GEO. D. MOTLEY,
Attorney for Defendants.

Filed in office this the 3rd day of May 1907.
JAMES T. BROOKS, *Clerk.*

Plaintiff's Motion to Strick-, &c., and Demurrer.

In the City Court of Gadsden.

B. T. COLLIER
vs.
WM. CHANDLER & M. B. JOHNSON.

Now comes the plaintiff in the above stated cause and moves to strike so much of pleas numbered 2, 3, 4, 5, 6, 7, 8, 9 & 10 filed the 3rd day of May, 1907, as purports to answer either count one or count two, or both count one and count two, of said complaint, on the ground that the issues so far as counts one and two are concerned have already been made up and defendants have obtained no leave of the Court to plead further to counts one and two, and on further ground that the matter set up in said pleas, so far as counts one and two are concerned, have already been adjudicated by this Court.

And plaintiff demurs to plea number two filed May 3rd, 1907, in so far as plea No. two is set up as a defense to count four of the complaint on the following ground:

1st. Said plea two confesses that Wm. Chandler the Sheriff, at the instigation and procuring of defendant Johnson, ignored plaintiff's claim of exemptions and sold the property in disregard of the same without setting up anything in avoidance of this breach of duty on the part of defendants.

And plaintiff demurs to plea number three filed May 3rd, 1907, in so far as plea three is set up as a defense to count four of the complaint on the same grounds above assigned to plea two.

And plaintiff demurs to plea number four filed the 3rd day of May 1907, on the ground that the facts alleged therein that Collier was declared a Bankrupt and that the property levied on has never been released by the bankrupt court, that is in gremio legis constitute no justification whatever for the wrongful taking alleged in the complaint and confessed in the plea, and plaintiff moves the Court to strike plea No. 5 filed Mat 3rd, 1907, on the ground that the defendants can obtain under pleas previously filed all the advantage that he could possibly obtain under plea five and that said plea is prolix and unnecessary.

And in the event the Court overruled this motion to strike plaintiff demurs to said five in so far as it set up a defense against count four of the complaint on the same grounds above assigned to plea number two.

And plaintiff demurs to plea number six filed Mat 3rd, 1907, on the ground that the facts set up therein afford no justification whatever for the wrongful seizure of the property alleged in the complaint and confessed by the plea.

And plaintiff demurs to pleas numbered 7, 8, 9 & 10 filed May 3rd 1907, on the same ground above assigned to plea number six.

31 GOODHUE & BLACKWOOD,
Attorneys for Plaintiff.

Filed in office this 17th day of May 1907.
JAMES T. BROOKS, *Clerk.*

Order of the Court on Motion to Strike and Demurrer.

B. T. COLLIER
vs.
M. B. JOHNSON & WM. CHANDLER.

On this the 28th day of May 1907, comes the parties by Attorneys and plaintiff moves to strike from the files the pleas of defendant upon the grounds specifically set forth in said motion, and upon due consideration, it is ordered and adjudged by the Court that said motion to strike be and the same is hereby overruled, and plaintiff demurs to defendants' pleas filed May 3rd, 1907, to plaintiff's complaint upon the grounds specifically set forth in said demurrer, and upon due consideration it is ordered and adjudged by the Court that

said demurrer to defendants' pleas to count Three (3) of plaintiff's complaint be and the same is hereby overruled, and further that said demurrer to the remaining pleas to the remaining counts of plaintiff's complaint be and the same is hereby sustained.

Judgment of the Court.

B. T. COLLIER
vs.
M. B. JOHNSON & WM. CHANDLER.

On this the 11th day of June 1907, come the parties by Attorneys, and issues being joined thereupon comes a jury of good and lawful men, to wit, L. Dowling and eleven (11) others who being duly elected, empaneled, sworn and charged according to law upon their oaths do say "We the jury find the issues in favor of the plaintiff and assess the damages in the sum of Twenty-one Hundred and Thirty-three & 17/100 Dollars," It is therefore considered and adjudged by the Court that the issues are in favor of the plaintiff and that the plaintiff have and recover judgment against the defendants for the said sum of Twenty one hundred thirty-three & 17/100 dollars damages so assessed together with the costs of suit and for which let execution issue.

Judgment on Motion.

Motion Docket, Page 92.

B. T. COLLIER
vs.
M. B. JOHNSON & WM. CHANDLER.

On this the 24th day of June 1907, came the parties by attorneys and the Plaintiff in open Court remits Six hundred dollars of the damages assessed by the jury in this case and the defendants
32 move the Court to set aside the verdict of the Jury in this case and grant a new trial, upon the grounds specifically set forth in said motion and upon due consideration it is ordered and adjudged by the Court that the defendant's said motion be and the same is hereby overruled and that the plaintiff recover judgment against the defendants for the costs in this behalf expended and for which let execution issue, and upon motion defendants are granted Thirty (30) days from this date in which to have a bill of exceptions signed by the presiding Judge of this Court.

Bill of Exceptions.

In the City Court of Gadsden.

B. T. COLLIER
vs.
M. B. JOHNSON & WM. CHANDLER.

Be it remembered that at the trial of the above stated cause the Hon. John H. Disque Judge presiding that the following proceedings were had and done.

Issues being joined as shown by the record in this case the evidence was in words and figures as follows, to wit:

Plaintiff, B. T. Collier, testified in his own behalf as follows: I am the plaintiff in this case. I owned the property a list of which is set out in claim of exemptions filed with the Sheriff I had the property on Broad Street in the James Martin brick storehouse. The property was taken from me by M. B. Johnson and Bill Chandler on the 18th day of July 1906.

And the plaintiff offered in evidence the following execution with all the endorsements thereon, to wit:

Clerk's Fees,	Amount.....	$9.60
Sheriff's Fees,	Amount.....	4.65
Witness fee,	"	3.00
	Total.....	417.25 all costs itemized on Execution.

City Court of Gadsden.

THE STATES OF ALABAMA,
Etowah County:

To any Sheriff of the State of Alabama, Greeting:

You are hereby commanded, that of the goods and chattels, lands, and tenements of B. T. Collier you cause to be made the sum of ($865.00) Eight hundred sixty five Dollars, which M. B. Johnson as executor of T. L. Johnson, dec'd recovered of him on the 9th day of April 1906, by the judgment of the City Court of Gadsden,
33 besides costs of suit and have the same to render the said M. B. Johnson as Executor of the estate of Thos. L. Johnson, Dec'd, and make return of this writ and the execution thereof according to law.

Witness my hand this 18th day of July, 1906.

JAMES T. BROOKS, *Clerk.*

Endorsement on Execution.

THE STATE OF ALABAMA,
Etowah County:

By virtue of the within execution I have levied on one Restaurant outfit consisting of twenty dining tables, 62 p. chairs, 4 rocking chairs, 8 side tables dishes, knives, forks, spoons, cups, saucers, glasses, sugar bowls, pepper boxes, salt stands &c., 144 napkins, table cloths, & towels, 1 range fixtures, 1 dish rack, 1 sideboard, 2 ice boxes, 1 china tea set 1 hat rack, 1 coat rack, 5 wall glasses, 1 coffee urn, 5 silver coffee pots, 3 large coffee pots, 1 tea pot, 19 cans baking powder, 35 cans corn, 5 boxes coke, 75 lbs., 2 cooking safes, 8 stools, 1 office chair, 1 show case, 1 cash register, 4 boxes cigars, 11 large pictures, 8 small pictures, 1 singer sewing machine, 1 settee, 5 sofa pillows, 14

bed steads, pillows mattresses quilts, sheets springs, 1 cot and mattress, 5 dresser- 1 book case, 1 leather couch 1 wardrobe, 5 washstands, 2 centre tables, 1 barrel vinegar, 1 keg catsup, 3 artificial ferns, 15 jars flowers, 2 hat racks. This includes the entire outfit now in Restaurant owned by B. T. Collier in Gadsden, Ala., this 18th day of July 1906.

WM. CHANDLER, *Sheriff.*

The within described property has this day been sold to M. B. Johnson for the sum of Six hundred and fifty dollars this July 30th, 1906.

WM. CHANDLER, *Sheriff.*

Received M. B. Johnson Forty-two & 37/100 dollars costs and commissions in full in this case.

WM. CHANDLER, *Sheriff.*

Received of Wm. Chandler, Sheriff Five Hundred twenty five & 37/100 — on this judgment this being the amount of bid less costs $142.37 rent J. B. Martin $75.00 & rent W. P. Johnson $8.00, 7/31/06.

GEO. D. MOTLEY, *Att'y.*

Rec'd of Sheriff $12.60 Clerk's cost and witness fees July 31, 1906.
JAMES T. BROOKS, *Clerk.*

Plaintiff then offered in evidence the following claim of exemptions to wit:

34 THE STATE OF ALABAMA,
Etowah County:

Before N. F. Green a notary public in and for said County personally appeared B. T. Collier, who being duly sworn doth depose and say that he is a bona fide resident citizen of the County of Etowah of said State, and that he hereby makes known and declares under oath that he was adjudicated a bankrupt in the United States Court, Eastern Division of the Northern District of Alabama at Anniston, Alabama, on the 20th day of July 1906, that he claimed the personal property hereinafter set forth as exempt to him on the filing of his said petition for adjudication in bankruptcy, as aforesaid, and that without waiving any rights he acquired by filing such claim of exemption in bankruptcy, he has here selected and claimed as exempted to him, under the constitution and laws of the State of Alabama, the following described personal property, levied on by William Chandler as Sheriff of Etowah County on the 18th day of July 1906, on an execution issued on said date out of the City Court of Gadsden, on a judgment rendered by said Court on the 9th day of April 1906, against B. T. Collier and in favor of M. B. Johnson as extr. T. L. Johnson deceased, namely:

NOTE.—(Here follows Schedule which is identical with Schedule set out on page 13 of this transcript) all of which said personal prop-

erty as set forth above and which is of value less than One Thousand (1000) Dollars, is hereby claimed as exempt from levy & sale for the collection of any debt contracted by him under the constitution and laws of the State of Alabama, that the above judgment on which said execution was issued was on a debt contracted by claimant since April 23, 1873, said property claimed as exempt, being more particularly described in the schedule which follows having a total valuation of Six Hundred and Sixty eight & 10/100 ($668.10) Dollars, the said property hereinafter described being the identical property levied on under said execution. (Here follows Schedule of personal property, which is identical with schedule set out in this transcript at pages 14, 15, 16 & 17.)

B. T. COLLIER.

Subscribed and sworn to before me, this 28th day of July, 1906.
N. F. GREEN, *N. P.*

Filed this 28th day of July, 1906.
WM. CHANDLER, *Sheriff.*

Said B. T. Collier further testifying says that it was his signature to the claim of exemptions, and this witness further testified
35 that the amount set opposite each article named in the claim of exemptions filed with the Sheriff by him is the market value of the same. The sewing machine mentioned in the claim of exemption had not been fully paid for and that there was $20.00 balance due, for which the Singer Manufacturing Co. held a retention title note that the value of the machine was $18.00 more than the $20 00 balance due, and that the values set opposite each article named in the claim of exemption is the correct market value of the same.

I was keeping a Café, boarding and sleeping customers. I never got any of these things back. I took out the claim of exemption on Friday and the things were sold on Monday afterwards. I was sick in bed at the time of the levy and when the goods were sold. I did not know or receive notice of contest of any exemptions. I was in possession of these things at the time of the levy and sale. The levy was made on Wednesday night, and on Saturday following this agreement with Mrs. Rebecca Lewis was made. No payments was ever made under this agreement.

The Plaintiff then offered in evidence the following contract, to wit:

STATE OF ALABAMA,
Etowah County:

This memorandum of agreement made and entered into by and between B. T. Collier and Mrs. Rebecca Lewis and R. W. Lewis and W. H. Barnes, surety of the said Mrs. Lewis, witnesseth:

1. The said B. T. Collier hereby agrees to sell unto the said Mrs.

Lewis all the furniture, tableware, kitchen utensils, and other property owned by him and used in the connection of the operation of his restaurant on Broad Street in the City of Gadsden, Alabama, and at No. 314 on said Street, a more particular description of said property to be furnished in a bill of sale (to be furnished in a bill of sale) to be made on the consummation of this contract but it is understood that the following property is not embraced in this contract viz: One wardrobe, one lounge, 5 pictures, 12 Japanese cups and saucers and one beer set, and two statuetts, the good will of said B. T. Collier in said restaurant business he agreeing in consideration of the stipulations of this agreement not to run a restaurant in the City of Gadsden, Alabama, for a period of two years from the date hereof. And this agreement is made upon consideration of one dollar in hand paid to the said B. T. Collier by the said Mrs. Lewis, the receipt whereof is hereby acknowledged and of the further agreements
36 upon the part of Mrs. Lewis as hereinafter set out.

2. The said Mrs. Lewis agrees to purchase of the said B. T. Collier the property referred to at and for the sum of Nine Hundred Dollars, of which amount $450 00 is to be paid in cash, upon the consummation of the agreement, and the remainder is to be paid in monthly installments of $50 00 each, the first payment to be made in thirty days from the date of the consummation of this agreement and the payment of the said $450 00 and then $50 00 for each consecutive month thereafter, and 30 days apart, for nine months—until said monthly installments have been paid in full; and it is agreed further to pay the said Collier interest on the full purchase price of 4(00 00 from July 20th 1906, at the rate of 8% and said Collier is to further have furnished to him free of charge at said restaurant board and lodging from the present to the time of the payment of the said $450 00 and the installments mentioned are to be made in notes of the said Mrs. Lewis payable as aforesaid, and the same are to be secured by R. W. Lewis, and a mortgage on the property in question, or other security that may be satisfactory to the said Collier.

3. Said Collier agrees to sell to the said Mrs. Lewis said property and privileges, at and for the sum, and on the conditions and term mentioned.

4. It is mutually understood that this agreement to convey is to be consummated upon the part of all parties immediately upon the said Collier getting said property in a condition where he may make a good title thereto, whether by terminating the litigation involving it or otherwise.

5. It is further mutually understood that for the present and until this agreement is consummated, if said Collier gets said property in condition to consummate it, the property mentioned and the restaurant mentioned, as far as said Collier is concerned, is to remain in the control and custody of said Lewis, but said Collier is not to -- held responsible for delays or failures in clearing up the title to said property. Said Lewis paying operating expenses including rents, lights water &c., but assuming no debts contracted prior to July 19, 1906.

Interlineations and erasures made before execution, and this agreement is executed on duplicate on the date mentioned below said Collier and Mrs. Lewis each retaining a copy of same.

37 Given under the hands and seals of each party,

MRS. R. W. LEWIS. [SEAL.]
W. H. BARNES. [SEAL.]
R. W. LEWIS. [SEAL.]
B. T. COLLIER. [SEAL.]

July —, 1906.

Attest:
JNO. W. INZER.

On Cross Examination plaintiff says:

M. B. Johnson was not there at the time of the levy. Mr. Handy first came to my room he was a deputy Sheriff. He took me by the hand and told me he had to levy. I had not turned the property over to Mrs. Rebecca Lewis at the time of the levy. Mr. Lewis was not there at the time of the levy. Mr. Lewis sent his young man to get the run of the place. Lewis's young man was there, he told me he wanted to go there and get familiar with the business. The next morning the property was to be turned over to Lewis if he paid the money. The time spoken of was at the time of the levy on July 18th, 1906. I had a conversation with M. B. Johnson after the Sheriff's sale. I made the affidavit to the claim of exemptions and Inzer filed it. A. W. Burns had nothing to do with the cash register Mr. Burns said I could have show case for $5.00 and he would board it out his account was $7.00. Woodliff-Dunlap Furniture Co. had no claim on the furniture. I had paid them every cent of it. The pistol mentioned in the claim was not levied on, as I had it in my trunk. I had a conversation with M. B. Johnson after this suit was brought, nothing was said about the exemptions. He told me as well as I can remember that he was just carrying out his father's wishes. I am a resident and citizen of this County and State and have been since 1891. I have lived in Gadsden since 1896, and was at the time I claimed the exemption. I won $750.00 from T. L. Johnson on an election bet, and he sued me to recover it and the execution under which the sale was made was issued on the judgment recovered against me in the above stated suit. I never saw M. B. Johnson in possession of the goods but Johnson told me he had sold them to Mrs. R. W. Lewis at what he bought them in for. He, M. B. Johnson got Martin to buy them, it occurred at my old place of business. Mr. Handy made the levy.

The defendant asked the plaintiff the following question:

Q. Did you authorize Walter Martin, the book-keeper of M. B. Johnson to credit the judgment against you in favor of M. B. Johnson as executor of T. L. Johnson deceased with the surplus and pay the balance to you?

38 The plaintiff objected to the above question, the Court sustained the objection and the defendants then and there duly excepted.

Plaintiff said further that he did not agree with Spoon Motlow, that he, Motlow was to pay the balance of his judgment after allowing credit for goods sold under judgment against you. I owed rent on the house occupied by me, and in which my goods were kept, 1½ months at $50.00 per month, and $8.00 for rent of rooms. The $75.00 was due J. B. Martin for rent, the $8.00 to W. P. Johnson, I never in any way received anything for the goods sold. The plaintiff then introduced John A. Inzer, a member of the firm of Bilbro, Inzer & Stephens, Attorneys who testified as follows:

Our firm represented the plaintiff at the time of the levy. On the night of July 18th, 1905, I went down to the restaurant on Broad Street where plaintiff had been running a restaurant and I found a number of parties there. Mr. Hanby Deputy Sheriff, a young man named Harris and a Miss Snyder were in there. Miss Snyder was plaintiff's cashier. I took supper and dinner there, and Miss Snyder was at the cashier's desk on both occasions. Miss Snyder and Mr. Harris were there. The agreement between plaintiff and Rebecca Lewis above set out was made after the levy, towit, July 19th, 1905 Plaintiff first signed it then Lewis signed it and then Barnes signed it, it was signed at various times. The claim of exemptions was typewritten by C. P. Butcher, he brought it to our office, and Butcher and I went to Sheriff's office, and I as Attorney for plaintiff Collier left the original claim of exemptions with the Sheriff, and we kept a copy. I saw the Sheriff give the claim of exemptions to Geo. D. Motley. The sale of the goods was made on Monday and claim of exemptions was given to the Sheriff on Saturday before. I was present at the sale. Walter Martin bought the property for M. B. Johnson. Will Lister who was in the Sheriff's office cried off the property and sold it. Wm. Chandler was there. I asked him if he was going to sell the property in defiance of the restraining order. He said the bankrupt Court had allowed him to sell. I told him that he had claimed exemptions and filed it with you, and he said we had our remedy. I notified the public about the claim of exemptions and forbade the sale. Walter Martin was there, and he bid the property off at $650.00 for M. B. Johnson. I did not see M. B. Johnson, I don't know whether or not Walter Martin heard what I said
39 to the Sheriff, but he was right at my left at the time. I made announcement that B. T. Collier had filed his claim of exemptions and placed it in the hands of the Sheriff, and that if parties bought they would buy a law-suit. Wm. Chandler was right inside, he never got beyond the door 15 or 20 feet away. Lister was crying the sale. The young man Harris was in the restaurant the night of the levy, he was staying at the hotel of Mrs. Rebecca Lewis, Harris was around there somewhere when I ate supper. The levy was made after supper. After the levy I took R. W. Lewis to B. T. Collier and the Sheriff came up. And the Sheriff appointed R. W. Lewis as bailee of the property against the objection of B. T. Collier.

The Plaintiff then introduced C. P. BUTCHER, who testified as follows: I had a conversation with M. B. Johnson on the 7th day of August after the sale. M. B. Johnson said he had notice of the claim of exemption before the sale but left it with his Attorney. I

asked him if he authorized the sale and he said he left that to his Attorney I served order from bankrupt court restraining sale on M. B. Johnson, this order was revoked before sale. The plaintiff offered in evidence the original and amended complaints in the case of Thos. L. Johnson vs. B. T.Collier, which were as follows, towit:

THE STATE OF ALABAMA,
Etowah County:

City Court of Gadsden, January Term, 1904.

To any Sheriff of the State of Alabama, Greeting:

You are hereby commanded to summon B. T. Collier to appear before the City Court of Gadsden, in and for said County at the place of holding the same within thirty days from the service of this summons and complaint then and there to answer plead or demur to the complaint hereto annexed of Thos. L. Johnson. You are required to execute this process instanter, and return same immediately upon the execution thereof.

Witness my hand this 11th day of May, 1904.

JAMES T. BROOKS, *Clerk.*

Complaint.

No. 3291.

THOS. L. JOHNSON
vs.
B. T. COLLIER.

The plaintiff claims of the defendant the sum of seven hundred and sixty dollars, due from him for money on or about the 15th day of April, 1904, received by the defendant to the use of the plaintiff, which sum of money with the interest thereon, is still unpaid.

2. And the plaintiff claims of the defendant the further sum of seven hundred and sixty dollars, due from him for money had and received by the defendant for the use of the plaintiff on or about the 15th day of April 1904, which sum of money with interest thereon is still unpaid.

3. And the plaintiff claims of the defendant the further sum of Seven Hundred and Sixty Dollars, due from him for money received by the defendant belonging to the plaintiff, which was wagered on the result of the primary election held in Etowah County on the 11th day of April 1904, which sum of money with the interest thereon is still unpaid.

GEO. D. MOTLEY,
Attorney for Plaintiff.

Filed this the 11th day of May 1904.

JAMES T. BROOKS, *Clerk.*

Received in office this the 11th day of May 1904.
WM. CHANDLER, *Sheriff.*

Executed this the 14th day of May, 1904, by leaving a copy of the within summons and complaint with B. T. Collier, Defendant.
WM. CHANDLER, *Sheriff.*

In City Court of Gadsden.

No. 3291.

THOS. L. JOHNSON
vs.
B. T. COLLIER.

And now comes the plaintiff and by leave of the Court first had and obtained amends his complaint heretofore filed in this case by amending count three so as to read as follows:

3rd. And the plaintiff claims of the defendant the further sum of seven hundred and sixty ($760.00) dollars, due from him for money received by the defendant, paid and belonging to the plaintiff, which was wagered and lost by the plaintiff on the result of the primary election, held in Etowah County on the 11th day of April 1904, under the general laws of Alabama, which sum of money with the interest thereon, is still unpaid.

And the plaintiff further amends said complaint by adding counts four and five.

4th. And plaintiff claims of defendant the further sum of seven hundred and sixty ($760.00) dollars due from him for money lost by the plaintiff as the result of a wager on the result of the primary election held in Etowah County, on the 11th day of April 1904, under the general laws of Alabama which said money was won and
41 received by said defendant in this case, which sum of money with the interest thereon, is still unpaid.

5th. And the plaintiff claims of the defendant the further sum of seven hundred and sixty ($760.00) dollars, due from the defendant for money received by him from plaintiff, which said money was won by defendant and lost by the plaintiff on a wager on the result of a primary election, under the general laws of Alabama, held on the 11th day of April, 1904, in and for Etowah County, for Probate Judge, which sum of money with the interest thereon is still unpaid.

GEO. D. MOTLEY,
Attorney for Plaintiff.

Filed in office this 20th day of October, 1904.
JAMES T. BROOKS, *Clerk.*

Plaintiff then introduced G. C. ALLEN, who testified as follows:

The plaintiff B. T. Collier was in bed and sent for me to draw a bill of sale and mortgage on afternoon of July 18/06. I went down

there and found R. W. Lewis there, they wanted to close up the trade that night and I told them I could not get the papers ready until the next morning. They asked me to see about drawing it up. Cash payment was to be $450.00 balance of it was to run over. The terms were given to me by the parties. Consideration was $900.00—$450.00 cash, balance $50.00 per month, secured by mortgage. I found next morning that R. W. Lewis was in possession of the restaurant as bailee. Harris was there, not in the cashier's place. Mr. and Mrs. R. W. Lewis were there while I was eating supper on the time of the levy. They said they wanted to look over the things, and Harris was to be there to look after the things, and get acquainted. This conversation occurred between 4 and 5 o'clock in Collier's room on the evening of the levy. The parties had agreed on the terms but had not signed the contract. Mr. Collier was in charge of the restaurant, was not to be delivered until next morning. Miss Snyder was there as cashier for Collier. I do not remember who I settled with for my supper.

The plaintiff then introduced Miss Viola Snyder, who testified as follows: Mr. Collier was in possession of the property at the time of the levy. I was keeping the cash. Mr. & Mrs. Lewis and Mr. Harris were in there with a view of learning. I took charge of the cash. I was working for Mr. Collier.

Plaintiff then offered in evidence the following judgment, towit:

42 *Minutes City Court of Gadsden, No. 6, Page 393.*

Motley. Lee, Lee & Lee et al.

3291.

M. B. JOHNSON, as the Executor of the Last Will and Testament of Thos. L. Johnson, Deceased,

vs.

B. T. COLLIER.

$865.00.

On this the 9th day of April 1903, come the parties by Attorneys and the issues being joined thereupon comes a jury of good and lawful men, towit: T. W. Morrow and eleven (11) others who being duly elected empanneled sworn and charged according to law upon their oaths do say "We the jury find the issues in favor of the plaintiff and we assess the damages in the sum of Eight Hundred and Sixty five Dollars," It is therefore considered and adjudged by the Court that the issues are in favor of the plaintiff and that the plaintiff recover judgment against the defendant for the said sum of eight hundred and sixty-five dollars damages so assessed together with the costs of suit and for which let execution issue.

The plaintiff then closed.

The degendant then introduced J. B. MARTIN, who testified as follow-:

That M. B. Johnson paid him $75.00 rent that was due by B. T. Collier, for rent of store house in which restaurant was situated.

Defendants then introduced A. W. BURNS, who testified as follows: I owned the show-case that was in the restaurant run by B. T. Collier. It belonged to me. I had a cash drawer to it. I left the show case and cash drawer with Collier. I told him I would let him have it for $10.00, but he never bought it. Collier had had it for two or three years, and was worth $10.00. I went to M. B. Johnson and told him that it was mine, when it was levied on. I told R. W. Lewis about it.

The defendants then introduced M. B. JOHNSON, as witness in their behalf who testified as follows:
I am one of the defendants in this case. I never heard anything of exemptions before the sale. I never spoke to Mr. Butcher about it, that I remember I never gave the Sheriff any instructions about it whatever, I never had any conversation with Collier, he has not spoken to me for several months. I directed Mr. Martin to go to the sale and purchase the property. I never knew of the levy until next morning after it was made. I do not remember seeing any advertisements. I told Walter Martin to go — the sale, he is my
43 book-keeper he came back and told me he had bought the property at $650.00. I did not hear of claim of exemptions at the time of the injunction between Collier and Lewis. I never offered to return the property sold. I took it as my own when I bought it. I never turned it back. I sold it to Mr. Lewis a short time after the sale by the Sheriff. Martin did not tell me about the claim of exemptions. I do not remember having any conversation with Mr. Butcher about this matter. I did not order the issue of execution. I knew that there was some difficulty, but did not know what it was about. I think Geo. D. Motley went over to Anniston to see something about this case. I would say that Butcher filed the papers with me. It was a restraining order from the Bankrupt court which was afterwards revoked by the bankrupt court.

Defendants then introduced WILLIAM CHANDLER, who testified as follows: I was Sheriff when the property was levied upon. I do not remember if property was advertised. I think we did tack up advertisements on a board in front of the Court House and then we put it in a newspaper for a couple of weeks. I never told M. B. Johnson about the claim of exemptions and he never advised me to sell the property, I was not there when the levy was made. I got there a short time afterwards. M. B. Johnson never gave me any instructions. I sold the property under the execution. I submitted the matter of exemptions to my regular retained Attorney, Geo. D. Motley, and I followed his advice in the matter. I told Mr. Motley about the matter, he was my regular Attorney. He was also the Attorney for M. B. Johnson. I went to see Geo. D. Motley as soon as I got the claim of exemptions I never gave M. B. Johnson any notice about the exemptions. I did not do anything with the exemp-

tions only to turn it over to my Attorney Geo. D. Motley, and all he said then was that he would see about it. I said nothing that I remember when I turned it over to Geo. D. Motley. Afterwards my Attorneys told me to sell, this was on Monday. I got it through a telegram. My best recollections the telegram was addressed to me. My deputy made the sale. I told Inzer that he had his remedy. I had no indemnifying bond. I never heard Inzer give notice at sale. I appointed R. W. Lewis as bailee of the goods.

M. B. JOHNSON again took the stand and testified as follows: I have got the note retaining the title of the sewing machine. It was transferred to me by the Company when I paid the balance due them. I gave the money to Geo. D. Motley my Attorney to pay the
44 the costs, the rent due J. B. Martin and W. P. Johnson to deliver to the Sheriff. The money came out of my hand and was to come out of the funds in the hands of the Sheriff. I did not pay anything to the Sheriff except the amount to pay rent liens and the cost. I do not know whether I got telegram from my Attorney or not.

This being all the evidence the Court thereupon at the request of the defendant gave the jury the following written charges towit:

Th Court charges the jury that plaintiff can only recover the value of his interest in the property sold by the defendant Chandler.
Given.

JNO. H. DISQUE, *Judge.*

The Court charges the jury that defendants are entitled to be reimbursed for the rent paid Martin & Johnson.
Given.

JNO. H. DISQUE, *Judge.*

The Court charges the jury that the Sheriff is authorized to disregard a claim of exemptions where the defendant is not entitled to exemptions and if the Sheriff was honestly mistaken about plaintiff being entitled to exemptions as against the execution in his hands against the plaintiff there can be no recovery of exemplary or vindictive damages in this case.
Given.

JNO. H. DISQUE, *Judge.*

The Court charges the jury that unless the plaintiff was entitled to immediate possession at the time of the conversion of the property in controversy they should find a verdict for the defendants.
Given.

JNO. H. DISQUE, *Judge.*

The Court charges the jury that the plaintiff can not recover for the sewing machine.
Given.

JNO. H. DISQUE, *Judge.*

The Court charges the jury that if the defendant Chandler was advised by his Attorney that he had a right to disregard the claim of exemptions of the plaintiff and the Sheriff sold the property in pursuance and on account of such advice and not by reason of any ill will or malice or other improper motive there can be no recovery of exemplary of vin'ictive damages in this case, by the plaintiff against these defendants.

Given.

JNO. H. DISQUE, *Judge.*

The Court charges the jury the plaintiff can not recover against the'e 'efen'ants on counts 3 & 4 of the complaint.

Given.

JNO. H. DISQUE, *Judge.*

The Court charges the jury that the receiving the proceeds
45 of the sale and appropriating the same to his own use by defendant M. B. Johnson without a full knowledge of the tortious acts of defendant Chandler would not make defendant Johnson liable in this case.

Given.

JNO. H. DISQUE, *Judge.*

The Court charges the jury that if either of the defendants were acting in good faith on advice of counsel then they can not find a joint verdict against defendants for exemplary or vindictive damages.

Given.

JNO. H. DISQUE, *Judge.*

The Court charges the jury that unless the evidence shows that plaintiff was entitled to imme'iate possession of the property in controversy at the time of the conversion they should find a verdict for the defendant.

Given.

JNO. H. DISQUE, *Judge.*

The Court gave the jury the following charge which was asked by the plaintiff in writing, towit: If there was a joint reckless disregard of the rights of the plaintiff and a wanton intention to sell the property when defendants knew they had no right to disregard plaintiff's claim of exemptions and knew of the existence of the claim of exemptions and if the sale was made by the Sheriff under the circumstances above detailed and Johnson aided or abetted the Sheriff in making such sale, then the jury may in their discretion award punitive damages not to exceed the amount named in the complaint.

Given.

JNO. H. DISQUE, *Judge.*

To the giving of this charge the defendants then and there separately and severally excepted.

The defendants asked the following charges in writing which *was* marked refused by the Court, towit:

1. The Court charges the jury that there can be no recovery of exemplary damages in this case.
Refused.

JOHN H. DISQUE, *Judge.*

To the refusal of the Court to give charge No. 1 as above stated the defendants then and there severally and separately excepted.

2. The Court charges the jury if they believe the evidence in this case they should find a verdict for defendants.
Refused.

JOHN H. DISQUE, *Judge.*

To the refusal of the Court to give charge No. 2 as above stated the defendants then and there separately and severally duly excepted.

3. The Court charges the jury that if the judgment against plaintiff under which an execution issued and sale made by de-
46 fendant Chandler was for money won on a wager or bet then they must find for defendants.
Refused.

JOHN H. DISQUE, *Judge.*

To the refusal of the Court to give charge No. 3 as above stated the defendants then and there separately and severally duly excepted.

4. The Court charges the jury that the plaintiff can not recover exemplary or vindictive damages against defendant M. B. Johnson in this case.
Refused.

JOHN H. DISQUE, *Judge.*

To the refusal of the Court to give charge No. 4 as above stated the defendants then and there separately and severally duly excepted.

5. The Court charges the jury that there can be no recovery in this case beyond the actual value of the goods with interest.
Refused.

JOHN H. DISQUE, *Judge.*

To the refusal of the Court to give Charge No. 5 as above stated the defendants then and there separately and severally duly excepted.

6. The Court charges the jury that unless they find that both of the defendants are jointly liable they must find a verdict for the defendants.
Refused.

JOHN H. DISQUE, *Judge.*

To the refusal of the Court to give charge No. 6 as above stated the defendants then and there separately and severally duly excepted.

7. The Court charges the jury that the burden is on the plaintiff to show that each of the defendants were jointly liable and unless the jury finds from the evidence that the defendants are jointly liable they must find a verdict for the defendants.

Refused.

JOHN H. DISQUE, *Judge.*

To the refusal of the Court to give charge No. 7 as above stated the defendants then and there separately and severally duly excepted.

8. The Court charges the jury that if they find from the evidence that the judgment against plaintiff in favor of M. B. Johnson as executor of Thos. L. Johnson deceased, was for a wager or bet on an election they must find for the defendants.

Refused.

JOHN H. DISQUE, *Judge.*

To the refusal of the Court to give charge No. 8 as above stated the defendants then and there separately and severally duly excepted.

9. The Court charges the jury that unless they find from the evidence that M. B. Johnson indemnified defendant Chandler or directed Chandler to sell the property then they can not find a verdict against defendant Johnson.

Refused.

JOHN H. DISQUE, *Judge.*

47 To the refusal of the Court to give Charge No. 9 as above stated the defendants then and there separately and severally duly excepted.

The jury thereupon, towit, 11th day of June, 1907, returned a verdict in favor of the plaintiff against both defendants jointly and assessed the damages at $2,133.17.

And the Court thereupon rendered judgment against both defendants for said amount together with the costs of suit, and the defendants then and there duly excepted to the rendition of said judgment.

And the defendants on the 14th day of June, 1907, entered on the motion docket of the City Court of Gadsden the following motion towit:

Motion Docket, Page 92.

B. T. COLLIER
vs.
M. B. JOHNSON & WM. CHANDLER.

Come the defendants in this case and move the Court to set aside the verdict of the jury rendered in this case and grant a new trial on the following grounds, towit:

1st. The Court erred in giving Charge "A" asked for by the plaintiff.

2nd. The Court erred in refusing Charge No. 1 asked for by the Defendants.

3rd. The Court erred in refusing Charge No. 2 asked for by the defendants.

4th. The Court erred in refusing Charge No. 3, asked for by the defendant-.

5th. The Court erred in refusing Charge No. 4, asked for by the defendant-.

6th. The Court erred in refusing Charge No. 5 asked for by the defendant-.

7th. The Court erred by refusing Charge No. 6 asked for by the defendant-.

8th. The Court erred in refusing charge No. 7 asked for by the defendant-.

9th. The Court erred in refusing charge No. 8 asked for by the defendant-.

10. The Court erred in refusing charge No. 9 asked for by 48 defendant-.

11th. The Court erred in charging the jury as to vindictive damages.

12th. The verdict of the jury is contrary to law.

13th. The verdict of the jury is contrary to the charge of the Court.

14th. The verdict of the jury is excessive.

15th. The verdict of the jury assesses excessive damages.

16th. The verdict of the jury assesses unconscionable damages.

17th. The verdict of the jury is contrary to the evidence.

GEO. D. MOTLEY,
Attorney for Defendants.

To B. T. Collier or Goodhue & Blackwood, Bilbro, Inzer & Stephens, Butcher & Styles, his Attorneys of record.

This June 14th, 1907.

The Court entered the following order on said motion, towit: June 17th, 1907, set for June 24th, 1907. And on June 24th, 1907, this motion coming on to be heard the defendants offered in evidence all the testimony given in this case on the trial which is hereinbefore set out in this bill of exceptions in full, they also offered the written charges given by the Court at the instance of defendants

which charges *is* hereinbefore set out in this bill of exceptions, also offered the written charge "A" given at plaintiff's request, hereinbefore set out. Also offered in evidence and support of said motions charges No. 1 to 9 inclusive asked for by defendants in writing and refused by the Court which *is* hereinabove set out in the bill of exceptions this being all the evidence offered in said motion the Court thereupon rendered the following judgment on said motion, towit:

Motion Docket, Page 92.

B. T. COLLIER
vs.
M. B. JOHNSON & WM. CHANDLER.

On this the 24th day of June, 1907, come the parties by Attorneys, and the plaintiff in open Court remits Six Hundred Dollars of the damages assessed by the jury in this case, and the defendants move the Court to set aside the verdict of the jury in this case and grant a new trial upon the grounds specifically set forth in said
49 motion, and upon due consideration it is ordered and adjudged by the Court that the defendants' said motion be and the same is hereby overruled, and that the plaintiff recover judgment against the defendants for the costs in this behalf expended and for which let execution issue, and upon motion defendants are granted thirty (30) days from this date in which to have a bill of exceptions signed by the presiding Judge of this Court.

To the rendition of said judgment overruling defendants' motion the defendants then and there duly excepted separately and severally.

And now comes the defendants and presents this their bill of exceptions within the time allowed by law and the order of this Court and asks that the same be signed by the presiding judge and made a part of the record in this case, which is accordingly done, this the 28th day of June, 1907.

JOHN H. DISQUE,
Judge of the City Court of Gadsden.

Filed in Office Dec. 16th, 1907.

JAMES T. BROOKS, *Clerk.*

Appeal and Supersedeas Bond to Supreme Court.

THE STATE OF ALABAMA,
Etowah County:

City Court of Gadsden.

Know all men by these presents, That we, M. B. Johnson, William Chandler and W. H. Barnes are held and firmly bound unto B. T. Collier in the sum of Thirty two hundred dollars, for the payment of which, well and truly to be made and done, we bind ourselves, and each of us, our heirs executors, and administrators, jointly, and sev-

erally and firmly by these presents, and as part of this undertaking we hereby waive all our rights under the constitution and laws of the State of Alabama, to have any of our property real or personal, exempt from levy and sale in satisfaction hereof.

Sealed with our seals and dated this the 11th day of June 1907. The said B. T. Collier recovered judgment in said Court against M. B. Johnson and Wm. Chandler for the sum of One thousand five hundred thirty-three & 17/100 dollars and the sum of Forty & 95/100 Dollars the costs in that behalf expended; and, whereas, on this day the said M. B. Johnson and William Chandler as such defendants have made application for an appeal from said Judgment to the next term of the Supreme Court to be holden of and for said State,
50 to reverse said judgment, and also for a supersedeas of the execution of the said judgment, which has been granted on entering into this bond, Now therefore, the condition of the foregoing obligation is such that if the said M. B. Johnson and William Chandler shall prosecute their said appeal to effect, and satisfy such judgment as the Supreme Court may render in this case then the said obligation to be void, otherwise to remain in full force and effect.

M. B. JOHNSON. [L. S.]
WM. CHANDLER. [L. S.]
GEO. D. MOTLEY. [L. S.]
W. H. BARNES. [L. S.]

Approved 7/11/1907.
JAMES T. BROOKS, *Clerk.*

We hereby acknowledge ourselves appellants' security for costs of appeal to the Supreme Court of Alabama, in the case of B. T. Collier vs. M. B. Johnson and Wm. Chandler, in the City Court of Gadsden, said appeal is taken by the defendants in said case July 11th, 1907.

GEO. D. MOTLEY.
W. H. BARNES.

Filed this the 11th day of July 1907.
JAMES T. BROOKS, *Clerk.*

Notice of Appeal.

THE STATE OF ALABAMA,
Etowah County:

City Court of Gadsden.

To any Sheriff of the State of Alabama, Greeting:

You are hereby commanded to notify B. T. Collier of his Attorney of record that the defendants in the case of B. T. Collier vs. M. B. Johnson and William Chandler which was heard and determined at the January Term 1907 of said Court, have taken an appeal to the Supreme Court of Alabama, returnable to the next term thereof, and make immediate return of this writ how you have executed the same. Witness this 11th day of July 1907.

JAMES T. BROOKS, *Clerk.*

We accept due and legal service of the within notice of appeal and waive copy and service by the Sheriff. This 11th day of July 1907.

GOODHUE & BLACKWOOD,
Attorneys for Plaintiff.

51 *Certificate of Appeal.*

THE STATE OF ALABAMA,
Etowah County:

I, James T. Brooks, Clerk of the City Court of Gadsden, do hereby certify that the foregoing pages from 1 to 43 inclusive contain a full and complete transcript of the record and proceedings of the said City Court of Gadsden, in a cause therein pending wherein B. T. Collier is Plaintiff and M. B. Johnson and William Chandler defendants, and that the said defendants M. B. Johnson and William Chandler did, on the 11th day of July 1907, after executing an appeal and supersedeas bond and giving security for costs, obtain an appeal to the next term of the Supreme Court of Alabama, and that the said W. H. Barnes and Geo. D. Motley are the sureties on said appeal and supersedeas bond and also securities for costs of Appeal.

All of which I do hereby certify to the said Supreme Court this the 3rd day of January 1908.

JAMES T. BROOKS,
[SEAL.] *Clerk City Court of Gadsden.*

In Supreme Court of Alabama.

M. B. JOHNSON & WM. CHANDLER
vs.
B. T. COLLIER.

Assignment of Errors.

And now comes the appellants M. B. Johnson & Wm. Chandler and by leave of the Court first had and obtained assign errors separately and severally severance having been granted by this Court. And they separately and severally say there is manifest error in the record and proceedings in this case in this:

First. The Court erred in sustaining plaintiff's demurrer to defendants' plea No. 2. (Transcript pages 3-4 & 5.)

Second. The Court erred in sustaining plaintiff's demurrer to defendants' plea No. 3. (Transcript pages 3-4 & 5.)

Third. The Court erred in sustaining plaintiff's demurrer
52 to defendants' Plea No. 5. (Transcript pages 3-4 & 5.)

Fourth. The Court erred in sustaining plaintiff's demurrer to defendants' plea No. 6. (Transcript pages 3-4 & 5.)

Fifth. The Court erred in sustaining plaintiff's demurrer to defendants' plea No. 7. (Transcript pages 3-4 & 5.)

Sixth. The Court erred in sustaining plaintiff's demurrer to defendants' plea No. 8. (Transcript pages 3-4 & 5.)

Seventh. The Court erred in sustaining plaintiff's demurrer to defendants' amended plea No. 10. (Transcript pages 6-7-8 & 9.)

Eighth. The Court erred in sustaining plaintiff's demurrer to defendants' amended plea No. 11. (Transcript pages 6-7-8 & 9.)

Ninth. The Court erred in sustaining plaintiff's demurrer to defendants' amended plea No. 12. (Transcript pages 6-7-8 & 9.)

Tenth. The Court erred in sustaining plaintiff's demurrer to defendants' amended plea No. 13. (Transcript pages 6-7-8 & 9.)

Eleventh. The Court erred in sustaining plaintiff's demurrer to defendants' amended plea No. 14. (Transcript pages 6-7-8 & 9.)

Twelfth. The Court erred in sustaining plaintiff's demurrer to defendants' amended plea No. 15. (Transcript pages 6-7-8 & 9.)

Thirteenth. The Court erred in sustaining plaintiff's demurrer to defendants' amended plea No. 16. (Transcript pages 6-7-8 & 9.)

Fourteenth. The Court erred in overruling defendants' demurrer to plaintiff's amended Count No. 3. (Transcript pages 9-10-20-21-22½ & 22.)

Fifteenth. The Court erred in overruling defendants' demurrer to plaintiff's amended Count No. 4. (Transcript pages 10 to 22 inclusive.)

Sixteenth. The Court erred in overruling defendants' demurrer to plaintiffs' replication No. 2 to defendants' pleas No. 4 & 9. (Transcript pages 19-20-21-21½ & 22.)

Seventeenth. The Court erred in overruling defendants' demurrer to plaintiffs' replication No. 3 to defendants' pleas No. 4 & 9. (Transcript pages 19-20-21-21½ & 22.)

Eighteenth. The Court erred in sustaining plaintiffs' demurrer to defendants' pleas No. 2 to Count No. 4 of plaintiff's amended complaint. (Transcript pages 10 to 18-22-24 & 25.)

Nineteenth. The Court erred in sustaining plaintiff's demurrer to defendants' plea No. 3 to Count No. 4 of plaintiff's amended
53 complaint. (Transcript pages 10 to 18-23-25 & 26.)

Twentieth. The Court erred in sustaining plaintiff's demurrer to defendants' plea No. 4 to Count No. 4 of plaintiff's amended complaint. (Transcript pages 10 to 18-23-25 & 26.)

Twenty-first. The Court erred in sustaining plaintiff's demurrer to defendants' plea No. 5 to Count 4 to plaintiff's amended complaint. (Transcript pages 10 to 18-23-25 & 26.)

Twenty-second. The Court erred in sustaining plaintiff's demurrer to defendants' plea No. 6 to Count No. 4 of plaintiff's amended complaint. (Transcript pages 10 to 18-23-24-25 & 26.)

Twenty-third. The Court erred in sustaining plaintiff's demurrer to defendants' plea No. 7 to Count No. 4 of plaintiff's amended complaint. (Transcript pages 10 to 18-24-25 & 26.)

Twenty-fourth. The Court erred in sustaining plaintiff's demurrer to defendants' plea No. 8 to Count No. 4 of plaintiff's amended complaint. (Transcript pages 10 to 18-24-25 & 26.)

Twenty-fifth. The Court erred in sustaining plaintiff's demurrer to defendants' plea No. 9 to Count No. 4 of plaintiff's amended complaint. (Transcript pages 10 to 18-24-25 & 26.)

Twenty-sixth. The Court erred in sustaining plaintiff's demurrer to defendants' plea No. 10 to count No. 4 of plaintiff's amended complaint. (Transcript pages 10 to 18-24-25 & 26.)

Twenty-seventh. The Court erred in sustaining plaintiff's objection to defendants' question to B. T. Collier as follows: "Did you authorize Walter Martin, the book-keeper of M. B. Johnson to credit the judgment against you in favor of M. B. Johnson as executor of T. L. Johnson deceased with the surplus and pay the balance to you?" (Transcript page 32.)

Twenty-eighth. The Court erred in giving the written charge asked for by plaintiff. (Transcript page 39.)

Twenty-ninth. The Court erred in refusing to give charge No. 1 asked by defendants. (Transcript page 39.)

Thirtieth. The Court erred in refusing to give charge No. 2 asked by defendants. (Transcript page 39.)

Thirty-first. The Court erred in refusing to give charge No. 3 asked by defendants. (Transcript page 39.)

Thirty-second. The Court erred in refusing to give charge
54 No. 4 asked by defendants. (Transcript page 39.)

Thirty-third. The Court erred in refusing to give charge No. 5 asked by defendants. (Transcript page 39.)

Thirty fourth. The Court erred in refusing to give charge No. 6 asked by defendants. (Transcript pages 39 & 40.)

Thirty-fifth. The Court erred in refusing to give charge No. 7 asked by defendants. (Transcript page 40.)

Thirty-sixth. The Court erred in refusing to give charge No. 8 asked by defendants. (Transcript page 40.)

Thirty-seven. The Court erred in refusing to give charge No. 9 asked by defendants. (Transcript page 40.)

Thirty-eighth. The Court erred in overruling defendants' motion for a new trial. (Transcript pages 40-41 & 42.)

Thirty-ninth. The Court erred in not granting the defendants a new trial. (Transcript pages 40-41 & 42.)

Fortieth. The Court erred in rendering judgment against defendants. (Transcript page 26.)

GEO. D. MOTLEY.
Attorney for Appellants.

55 Minutes Supreme Court of Alabama, November Term, 1907.

TUESDAY, *January* 14*th*, 1908.

The Court met pursuant to adjournment.

Present:

Hon. Jno. R. Tyson, Chief Justice.
Hon. J. R. Dowdell, Associate Justice.
Hon. J. C. Anderson, Associate Justice.
Hon. T. C. McClellan, Associate Justice.

7 Div. 144.

M. B. JOHNSON et al.
vs.
B. T. COLLIER.

Appeal from Gadsden City Court.

Come the parties by attorney and on motion of the Appellants it is ordered that leave be granted the Appellants to sever in the assignments of error, and to assign errors separately as to each other. Come also the parties by attorneys, and argue and submit this cause for decision.

Minutes Supreme Court of Alabama, November Term, 1908.

WEDNESDAY, *December 16th*, 1908.

The Court met pursuant to adjournment.

Present:

Hon. Jno. R. Tyson, Chief Justice.
Hon. J. R. Dowdell, Associate Justice.
Hon. J. C. Anderson, Associate Justice.
Hon. T. C. McClellan, Associate Justice.

7 Div. 144.

M. B. JOHNSON et al.
vs.
B. T. COLLIER.

Appeal from Gadsden City Court.

Come the parties by attorneys, and the record and matters therein assigned for errors, being argued and submitted and duly examined and understood by the court, it is considered that in the
56 record and proceedings of the City Court there is no error. It is therefore considered that the judgment of the City Court be in all things affirmed. It is also considered that the Appellants M. B. Johnson and William Chandler and George D. Motley and W. H. Barnes sureties on the appeal bond, pay the costs of appeal of this Court and of the City Court.

December 29th, 1908.—Application for rehearing filed.

February 18th, 1909.—It is ordered that the Application for rehearing be overruled, and the opinion modified.

57 Feb. 18, 1909.

THE STATE OF ALABAMA,
Judicial Department:

The Supreme Court of Alabama, November Term, 1908-9.

7 Div. 144.

M. B. JOHNSON et al.
v.
B. T. COLLIER.

Appeal from Gadsden City Court.

DOWDELL, *J.:*

The first question for our consideration in this case is whether a claim of exemption can be made to personal property levied on under execution issued upon a judgment based on a complaint for money lost on a wager. The answer to this question involves the determination of the character of the action in which the judgment was rendered, whether in tort or contract. In the present instance the judgment on which the execution was issued was founded on a complaint containing a count for money had and received, etc., and a special count declaring for so much money lost by the plaintiff and won by the defendant on a wager.

The count for money had and received is unquestionably in indebitatus assumpsit, and hence an action ex contractu. The special count to recover back money lost and paid on a wager, on the principle stated in Johnson v. Motlow, 44 So. Rep. 42, wherein it was said: "It is money which the law, ex equo et bono considers as belonging to the plaintiff," is essentially of the same nature,
58 and therefore an action ex contractu. The provisions of the Constitution and statute relating to exemptions are not confined to debts arising out of express contracts, but extend also to such as arise out of implied contracts. This is a proposition of law too well settled to admit of any dispute. We are clearly of the opinion that Collier, the defendant in execution, could set up his claim to exemptions under the levy, and if contested was entitled to a hearing on such contest as provided by the statute. It was the duty of the sheriff under the law when the claim of exemptions was made, if no contest of such exemptions was filed as provided by the statute, section 2047 of Code 1896, to discharge the levy. If a contest was filed, then it was the sheriff's duty under the statute section 2050 Code 1896, to have returned the process and other papers to the court to which the process was returnable, accompanied with a full statement of the facts. Kennedy v. Smith, 99 Ala. 83.

The sheriff in disregard of the duty imposed upon him by the statute proceeded to sell and did sell the property levied on and which was claimed as exempt. This was an abuse of process, and

by such abuse of process he rendered himself a trespasser ab initio. When the claim of exemptions was lodged with the sheriff he had the right to look to the judgment upon which the execution was issued and to the complaint upon which the judgment was based, and it was his duty to do so, to determine whether under the law on the face of the record the defendant in judgment and execution was entitled to claim exemption, but beyond this the sheriff would not be authorized to go to determine the defendant's right to claim. We are not to be understood as deciding that the right to exemptions under execution is to be tested solely by the mere form of the action, but rather by the cause of the action as shown in the complaint. An action of debt, which is an action ex contractu, is a proper remedy to recover a penalty, yet the claim of exemptions as against an execution on such a judgment could not be asserted. We understand the law to be if the cause of action, the foundation of the judgment, arises out of a tort, a claim of exemptions would not be available as against such judgment.

59 In the instant case the judgment was based upon a complaint which we think is ex contractu and not ex delicto.

It is true that both the plaintiff and defendant in making a wager on the election violated a criminal statute which subjected both to a prosecution. That, however, is not the cause of action declared on here.

But for the statute which authorizes the recovery by action at law of money lost on a wager, the plaintiff would have no right of action. The cause of action does not arise out of a tort. Could it be said that when the defendant received the money voluntarily paid over to him by the plaintiff on the wager, that he, the defendant, was guilty of any tortious act towards the plaintiff? We think not.

The cause of action not being for penalty, nor arising out of a tort, but for money which the plaintiff paid the defendant on a void contract, and which the law says he may recover back, and which might be recovered in action for money had and received, as if upon an implied promise to pay, we are unable to see why the right of claim to exemptions may not be asserted against levy under a judgment in such a case.

It is not disputed that the plaintiff here, was in the possession of the property at the time of the levy and seizure, and it is therefore immaterial that he subsequently made a conditional contract of sale of it to Lewis. The sheriff being unable to justify under the process by reason of its abuse, he was a trespasser under the law when he seized the property. The plaintiff had the possession, and the trespass was necessarily against his possession. The case of Young v. Davis, 20 Ala. 155, is not opposed to the above views. The facts in the case differentiate it from the present case. "It is equally well settled that when property is subject to levy but the debtor has a right afterwards to claim and select a part or all of it as exempt and to have the same set apart for him, the officer is liable as a trespasser ab initio if he denies him this right and proceeds to sell the property notwithstanding a valid claim. Trespass is also a proper form of action to recover damages from a creditor who

directs or otherwise participates in a wrongful seizure and sale of exempt property."—12 Am. & Eng. Ency. Law (2nd ed.) p. 252.

60 There was evidence which tended to show and from which the jury were authorized to find that the officer knew that he was selling exempt property and in disregard of the debtor's claim of exemptions, and also evidence tending to show that Johnson, the creditor, participated in this action of the officer.

It is not necessary to a recovery of exemplary damages that they should be specially claimed in the complaint.—Wilkinson v. Searcy, 76 Ala. 176.

On the question of exemplary damages it was said by this court in Alley v. Daniel, 75 Ala. 403, "Malice may be implied for the purpose of awarding exemplary damages if it appears that the officer sold the property when he know that he had no right to do so."

If the evidence of the plaintiff in this case is to be believed, there can be no doubt under the law that the act of the officer in selling the property was in disobedience of the imperative mandate of the statute from which malice may be implied for the purpose of awarding exemplary damages.

But it is urged by the appellant that the officer acted under the advice of counsel, and that if he acted in good faith under the advice of counsel, he should not be held for exemplary damages. Waiving consideration of the fact that counsel whose advice the officer relied on was, also, counsel for the plaintiff in execution, it appears from the record that the question of the bona fides of the officer, was by the trial court fairly submitted to the jury, and there is nothing in this respect of which appellants have any reason to complain.

In the course of the trial, the defendant asked the plaintiff, who was being examined as a witness the following question: "Did you authorize Walter Martin, the bookkeeper of M. B. Johnson to credit the judgment against you in favor of M. B. Johnson as executor of T. L. Johnson, deceased, with the surplus and pay the balance to you?" An objection by the plaintiff was sustained by the court to this question. It does not appear from the record to what surplus the question had reference. The proceeds of sale of the property in question were insufficient to satisfy the judgment on which the execution issued, and hence there could be no surplus in that

61 instance to which any reference could be had. The trial court will not be put in error on appeal for sustaining an objection to a question apparently meaningless. If the question had reference to a surplus arising out of some other transaction than the sale of the property claimed as exempt, we are unable to see the relevancy of it.

We find no reversible error in the record, and the judgment will therefore be affirmed.

Affirmed.

Simpson, Anderson, Mayfield and Sayre, JJ., concurring.

McCLELLAND, J. (Dissenting):

The liability of the defendant in this action is controlled by the inquiry: whether the winner of a wager may claim his exemption against the enforcement of the recovery thereof by the loser? In my opinion the policy of our statute denies the right. That policy is thus aptly stated, by Denson, J., in Motlow v. Johnson, 145 Ala. 376: "The object of the statute avoiding gaming contracts is, besides placing the seal of the law's condemnation on such contracts, to put the parties in statu quo as to all money won or lost." This policy is emphasized by the provision that the recovery may be effected for the use of the looser's wife or children or next of kin.—Code of 1907, §3339.

In view of the stated policy, suggested by the highest moral considerations, it seems impossible to me that the right to defeat, by claim of exemptions, the recovery, plainly provided for, should stand on the same footing, be treated with the same favor, as the ordinary obligation to satisfy the demands arising out of a contract express or implied. If this favor is extended, the winner in the wager may flaunt in the face of the wife or children of the looser the sum won and which he secured by a violation of the penal statutes of the State.

The form of the action, debt, cannot influence the conclusion. Crawford v. Slaton, 133 Ala. 393, and authorities cited therein, afford a serviceable analogy; for there can be no distinction, in principle, between a case where the law declares the penalty
62 recoverable and one where it declares that the money or thing of value, received in violation of law, may be recovered.

This consideration is conclusive, to my mind, that my brothers are in error: If the thing lost at a wager be a chattel, an horse for instance; and the looser institute, as he may, detinue for its recovery, the defendant (the winner) could not claim any exemption in the premises, either as to the costs incurred or against the enforcement of judgment for the alternate value if the horse was not to be had. If this is true, then we have the anomaly of one looser being defeated in the recovery of money wagered and another, whose loss was a horse, successful in his action, because of the mere difference in the character of the thing wagered. A construction leading to such contradictory results must be unsound. The statute makes no distinction. Should we, by construction, create one in opposition to the plain terms of the statute?

63 In Supreme Court of Alabama.

M. B. JOHNSON et al., Appellants,
vs.
B. T. COLLIER, Appellee.

I, Robt. F. Ligon, Clerk of the Supreme Court of the State of Alabama, by virtue of the annexed writ of error, and in obedience thereto, do hereby certify that the foregoing pages numbered from 1 to 62, both inclusive, contain a true, full and complete transcript

of the record and proceedings had in said Court, in the case of M. B. Johnson, et al., Appellants, vs. B. T. Collier, Appellee (7 Div. No. 144), as the same appears of record on file in this office.

In testimony whereof, I have hereunto affixed my official signature, as Clerk of the Supreme Court of Alabama, and have caused the seal of said Supreme Court to be hereunto affixed at the Capitol, in the City of Montgomery, Alabama, on this the 10th day of May, 1909 A. D.

[Seal of the Supreme Court of Alabama.]

ROBERT F. LIGON,
Clerk of the Supreme Court of Alabama.

64 Supreme Court of Alabama. Filed Apr. 19, 1909. Robert F. Ligon, Jr., Clerk.

In the Supreme Court of Alabama.

M. B. JOHNSON and WILLIAM CHANDLER
vs.
B. T. COLLIER.

To the Honorable J. R. Dowdell, Chief Justice of the Supreme Court of Alabama:

Now come M. B. Johnson and William Chandler, the above appellants, by their attorneys, George D. Motley and John M. Chilton, and complain and allege that they are citizens of the United States of America, that in the above entitled cause on the 16th day of December, 1908 a final judgment was rendered against your petitioners by the Supreme Court of Alabama, that being the highest court of law or equity in the State of Alabama. That subsequently a petition for re-hearing was filed by said appellants in said cause which was over-ruled on to-wit the 17th day of February, 1909. Petitioners state that said proceedings were begun in the City Court of Gadsden in a complaint filed by said B. T. Collier against your petitioners wherein it was sought to recover against your petitioners in an action of trespass to which counts in trover were also added for taking and converting certain personal property.

That the complaint in said cause originally consisted of two counts. That subsequently two additional counts were added by way of amendment, but as to each of these counts the affirmative charge was given in the said City Court in favor of your petitioners.

Petitioners state that on to-wit the 5th day of September, 1906, your petitioners filed in said cause, amongst other pleas, two pleas which are numbered respectively 5th and 7th and which are as follows to-wit:

"5th. Defendants for further answer to said complaint saith that on the 20th day of July, 1906, the plaintiff filed a petition in Bankruptcy and filed schedule of property alleged to have been converted by the defendants in the Bankrupt Court as assets of his estate and

that said matter is still pending in said Bankrupt Court and that said property has never been released by said Court or set
65 apart to the plaintiff in this suit as exempt to him, but is in gremio legis.

7. The defendants for further answer to said complaint saith that the plaintiff in this suit, B. T. Collier, on the 20th day of July, 1903 file' a voluntary petition in bankruptcy in the United States District Court of Eastern Division of the Northern District of Alabama, a Court of competent jurisdiction and that the property alleged to have been converted by the defendants was scheduled in said Court as assets of the estate of the said B. T. Collier, and add that said matter is still pending in said court and that said property is still under the jurisdiction and protection of said United States Court."

That on to-wit the 12th day of November, 1906, demurrers were sustained by said City Court to each of said pleas. That afterwards, to-wit on the 13th day of November, 1903, the defendant by leave of the court filed additional pleas, including amongst others, pleas numbered respectively "10" and "12th" which were as follows, to-wit:

"10. Defendants for further answer to said complaint, saith that on the 20th day of July, 1903, the plaintiff filed a petition in bankruptcy and filed a schedule of property alleged to have been converted by the defendants in the bankrupt Court as assets of his estate, and that the said B. T. Collier was regularly declared and adjudged to be a bankrupt by the District Court of the United States for the Eastern Division of the Northern District of Alabama, and that said matter is still pending in said bankrupt court and that said property has never been released by said Court or set apart to the plaintiff in this suit as exempt to him, but is in gremio legis.

12th. The defendants for further answer to said complaint saith that the plaintiff in this suit, B. T. Collier, on the 20th day of July, 1903, filed a voluntary petition of bankruptcy in the United States District Court of Eastern Division of the Northern District of Alabama, a Court of competent jurisdiction, and that the property alleged to have been converted by the defendants was scheduled in said court as assets of the estate of the said B. T. Collier, and that said B. T. Collier was duly adjudged to be a bankrupt by said Court and that said matter is still pending in said Court and that
66 said property is still under the jurisdiction and protection of the said United States Court."

That on to-wit the 27th day of March, 1907, said City Court sustained demurrer to each of said two pleas.

That afterwards, to-wit on the 11th day of June, 1907, on issues joined in said cause, there was a verdict and judgment against your petitioners in favor of the said plaintiff for the sum of $2133.17. That subsequently, to-wit on the 24th day of June, 1907, your petitioners having moved for a new trial in said cause, the plaintiff in open court remitted $600.00 of the said damages so recovered and said City Court thereupon over-ruled said motion.

That on to-wit the 11th day of July, 1907, your petitioners appealed to the Supreme Court of Alabama to-wit to the then next

term of said Supreme Court of Alabama from said final judgment and superseded the same by the execution of a supersedeas bond in conformity to the statutes of the State of Alabama and also gave security for the costs of said appeal—both said supersedeas bond and security for costs having been approved by the Clerk of said City Court to wit on the 11th day of July, 1907.

That thereupon the record in said cause was transmitted to said Supreme Court and your petitioners assigned as error in said Supreme Court, amongst other errors that said City Court erred in sustaining Plaintiff's demurrer to said plea No. 5 and by separate assignment said City Court erred in sustaining plaintiff's demurrer to said plea No. 7 and by separate assignment also assigned the errors of said City Court in sustaining demurrers to said pleas No. 10 and No. 12th respectively—all of which will appear from the record in said cause.

That on to-wit the 13th day of March, 1908, said Supreme Court of Alabama over-ruled and held for naught said several assignments of error and affirmed said judgment so rendered in said City Court.

And afterwards on application for re-hearing filed as aforesaid, adhered to said judgment as aforesaid. Your petitioners state that in and by each of said pleas hereinbefore set forth numbered "5th, 7, 10," and "12th," your petitioners claimed immunity from said judgment in said cause under and by virtue of certain proceedings in bankruptcy referred to in said pleas which were had in
67 virtue of the act "To establish a uniform system of bankruptcy throughout the United States" approved July 1st, 1898 as amended by act of February 5th, 1903.

Petitioners state that said judgment of the Supreme Court of Alabama affirming said judgment so appealed from necessarily involved a determination adversely to petitioners of the Federal question presented by said several pleas. That in so determining this Honorable Court has denied to your petitioners a right claimed under the laws of the United States, to-wit under certain proceedings in bankruptcy had by virtue of the statutes of the United States.

Wherefore, your petitioners pray the allowance of a writ of error from the Supreme Court of the United States to the Supreme Court of the State of Alabama and the judges thereof, to the end that the record in said matter may be removed into the Supreme Court of the United States and the errors complained of by your petitioners may be examined and corrected and said judgment reversed.

Petitioners herewith present and file their assignment of errors in said cause and pray that the same may be allowed, and also tender herewith a supersedeas bond which they pray may be approved.

And your petitioners pray that such orders may be made as will supersede said judgment pending the hearing of said cause on writ of error in the said Supreme Court of the United States, and petitioners will ever pray, etc.

GEO. D. MOTLEY &
J. M. CHILTON,
Att'ys for Petitioners.

Filed in office April 19th, 1909. Rob't F. Ligon, Clerk Supreme Court of Alabama.

68 Supreme Court of Alabama. Filed Apr. 19, 1909. Robt. F. Ligon, Jr., Clerk.

In the Supreme Court of Alabama.

M. B. JOHNSON and WILLIAM CHANDLER
vs.
B. T. COLLIER.

The above entitled matter coming on to be heard upon the petition of said appellants therein for a writ of error from the Supreme Court of the United States to the Supreme Court of the State of Alabama, and upon examination of said petition and the record in said matter, and desiring to give the petitioners an opportunity to present in the Supreme Court of the United States the questions presented by the record in said matter:

It is ordered that a writ of error be and is hereby allowed to this court from the Supreme Court of the United States and that the supersedeas bond of said petitioners be and is hereby fixed in the sum of Three Thousand Dollars conditioned as required by Section 1007 of the Revised Statutes of the United States. April 19th, 1909.

J. R. DOWDELL,
Chief Justice Supreme Court of Alabama.

Filed in office April 19th, 1909. Robert F. Ligon, Clerk Supreme Court of Alabama.

69 Copy.

In the Supreme Court of Alabama.

M. B. JOHNSON & WM. CHANDLER
vs.
B. T. COLLIER.

On Writ of Error to the Supreme Court of the United States.

Know all men by these presents, that we, M. B. Johnson & Wm. Chandler as principals, and The United States Fidelity & Guaranty Co., as surety, are held and firmly bound unto B. T. Collier in the full and just sum of three thousand dollars, to be paid to the said B. T. Collier, his certain attorneys, executors, administrators, or assigns to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this the 17th day of April, 1909.

Whereas, lately at a session of the Supreme Court of Alabama, in a suit pending in said Court between M. B. Johnson & Wm. Chandler Appellants and B. T. Collier, Appellee, a final judgment was

rendered against said Appellants, and the said M. B. Johnson & Wm. Chandler, appellants, having obtained from said Court a writ of error to reverse the judgment in the aforesaid suit, and a citation directed to said B. T. Collier is about to be issued, citing and admonishing him to be and appear at the United States Supreme Court to be holden at Washington.

Now, the condition of the above obligation is such, that if the said M. B. Johnson & Wm. Chandler shall prosecute their writ of error to effect and shall answer all damages and costs that may be awarded against them, if they fail to make their plea good, then the above obligation to be void; otherwise to remain in full force and virtue.

M. B. JOHNSON, [L. S.]
WM. CHANDLER, [L. S.]
THE UNITED STATES FIDELITY & GUARANTY CO., [L. S.]
By W. P. JOHNSON, *Attorney in Fact,* [L. S.]
By HOOD & MURPHREE, *Attorneys.* [L. S.]

Approved this the 17th day of April A. D. 1909.

J. R. DOWDELL,
Chief Justice.

Endorsed: Filed in office April 19, 1909. Robert Figon, Clerk Supreme Court of Alabama.

70 Supreme Court of Alabama. Filed Apr. 19, 1909. Rob't F. Ligon, Jr., Clerk.

In the Supreme Court of Alabama.

M. B. JOHNSON and WILLIAM CHANDLER
vs.
B. T. COLLIER.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Judges of the Supreme Court of the State of Alabama, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court of the State of Alabama, before you, or some of you, being the highest court of law of said State in which a decision could be had in the said suit between M. B. Johnson and William Chandler, Appellants and B. T. Collier, Appellee wherein said appellants invoked the protection and claimed immunity because of certain proceedings had in the District Court of the United States for the Eastern Divison of the Northern District of the State of Alabama had in pursuance of the Act "To establish a uniform system of bankruptcy throughout the United States" approved July 1st, 1898 as amended and the

decision denied the protection, privilege or immunity so set up and claimed under said proceedings in bankruptcy, error hath happened, to the great damage of the said M. B. Johnson and William Chandler as by their complaint appears. We being willing that error, if any hath been, shall be duly corrected, and full and speedy justice done to the persons aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

71 Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this the 17th day of April, in the year of Our Lord One Thousand Nine Hundred and Nine.

[Seal of the United States Circuit Court, Middle District of Alabama.]

J. DIMMICK,
Clerk of the Circuit Court of the United States for the Middle District of Alabama.

Filed in office this 19th day of April, 1909. Robert F. Ligon, Clerk Supreme Court of Alabama.

72 Supreme Court of Alabama. Filed Apr. 19, 1909. Rob't F. Ligon, Jr., Clerk.

In the Supreme Court of Alabama.

M. B. JOHNSON and WILLIAM CHANDLER
vs.
B. T. COLLIER.

The said appellants, M. B. Johnson and William Chandler, having petitioned that a writ of error be allowed from the Supreme Court of the United States to the Supreme Court of the State of Alabama removing this cause from the State Court to the said Supreme Court of the United States, now file with their said petition the following assignments of error:

First. Said Supreme Court of Alabama erred in over-ruling the third error assigned in said Court in and by which it was insisted that said City Court erred in sustaining plaintiffs' demurrer to defendant's said plea No. 5.

Second. Said Supreme Court erred in over-ruling the fifth assignment of error of these appellants in and by which it was insisted that said City Court erred in sustaining plaintiffs' demurrer to defendant's said plea No. 7.

Third. Said Supreme Court of Alabama erred in over-ruling the seventh assignment of error made by these appellants in said cause in and by which it was insisted that said City Court erred in sustaining plaintiffs' demurrer to defendant's said amended plea No. 10.

Fourth. Said Supreme Court of Alabama erred in over-ruling appellants' assignment of error number ninth in and by which it was insisted that said City Court erred in sustaining plaintiffs' demurrer to defendant's said amended plea No. 12.

Fifth. Said Supreme Court of Alabama erred in affirming the judgment of said City Court rendered on the demurrers interposed by said B. T. Collier to appellants' said plea No. 10.

Sixth. Said Supreme Court of Alabama erred in affirming the judgment of said City Court rendered on the demurrers interposed by said B. T. Collier to appellants' said plea No. 12.

Seventh. Said Supreme Court erred in the judgment rendered.

Eighth. Said Supreme Court erred in affirming the judg-
73 ment of said City Court.

Ninth. Said proceedings in the Bankrupt Court set up in said plea No. 12 presented a complete bar to the right of said plaintiffs to maintain said suit and the Supreme Court of Alabama erred in determining to the contrary.

Tenth. Said Supreme Court erred in not reversing said City Court on the assignments of error presented by these appellants in said Court.

GEO. D. MOTLEY &
J. M. CHILTON,
Att'ys for Petitioners.

Filed in office this 19th day of April, 1909. Robert F. Ligon, Clerk Supreme Court of Alabama.

74 Supreme Court of Alabama. Filed Apr. 19, 1909. Rob't F. Ligon, Jr., Clerk.

In the Supreme Court of Alabama.

M. B. JOHNSON AND WILLIAM CHANDLER
vs.
B. T. COLLIER.

UNITED STATES OF AMERICA, *ss:*

To B. T. Collier, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States at Washington, on the second Monday in October A. D. 1909, pursuant to a writ of error filed in the Clerk's office of the Supreme Court of Alabama, wherein M. B. Johnson and William Chandler are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error as in the said writ of

error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable J. R. Dowdell, Chief Justice of the Supreme Court of Alabama, this 19" day of April, in the year of Our Lord One Thousand Nine Hundred and Nine.

J. R. DOWDELL,
Chief Justice Supreme Court of Alabama.

Filed in office this 19th day of April 1909.

ROBERT F. LIGON,
Clerk Supreme Court of Alabama.

75 In the Supreme Court of Alabama.

M. B. JOHNSON AND WILLIAM CHANDLER
vs.
B. T. COLLIER.

UNITED STATES OF AMERICA, *ss:*

To B. T. Collier, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States at Washington, on the second Monday in October, A. D., 1909, pursuant to a writ of error filed in the Clerk's office of the Supreme Court of Alabama, wherein M. B. Johnson and William Chandler are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable J. R. Dowdell, Chief Justice of the Supreme Court of Alabama, this 19th day of April, in the year of Our Lord One Thousand Nine Hundred and Nine.

J. R. DOWDELL,
Chief Justice Supreme Court of Alabama.

76 Endorsed: Original. The within citation was served on B. T. Collier the party named within this the 5 day of May 1909 by handing a copy of the within to B. T. Collier. B. M. Pike, Sh'ff, Etowah County, Alabama.

77 In the Supreme Court of Alabama.

M. B. JOHNSON et al., Appellant,
versus
B. T. COLLIER, Appellee.

I, Robt. F. Ligon, Clerk of the Supreme Court of Alabama, by virtue of the within writ of error, and in obedience thereto, do hereby send herewith the record and proceedings in said cause, together

with the petition for writ of error, order allowing same, original writ of error, original citation and proof of service, original assignments of error, and copy of writ of error bond, duly certified and authenticated according to law, to the Honorable the Supreme Court of the United States.

In Testimony Whereof, I have hereunto affixed my official signature as Clerk of the Supreme Court of Alabama, and have caused the seal of said Supreme Court to be hereunto affixed, at the Capitol, in the City of Montgomery, Alabama, on the 10th day of May, in the Year of Our Lord, One Thousand Nine Hundred and Nine.

[Seal of the Supreme Court of Alabama.]

ROBERT F. LIGON,
Clerk of the Supreme Court of Alabama.

Endorsed on cover: File No. 21,770. Alabama Supreme Court. Term No. 104. M. B. Johnson and William Chandler, plaintiffs in error, vs. B. T. Collier. Filed July 22d, 1909. File No. 21,770.

IN THE

Supreme Court of the United States

ON ERROR TO THE SUPREME COURT OF ALABAMA.

M. B. JOHNSON & WILLIAM CHANDLER

vs.

B. T. COLLIER.

STATEMENT OF FACTS, ARGUMENT AND BRIEF.

STATEMENT OF FACTS.

This was a suit brought for damages in the City Court of Gadsden, Alabama, and the complaint was in code form for trover and trespass for conversion of property by the plaintiffs in error, William Chandler, as Sheriff, and M. B. Johnson, as plaintiff in execution. The plaintiffs in error, among others, filed pleas No. 5 and 7, which were as follows:

> 5. "Defendants for further answer to said complaint saith that on the 20th day of July, 1906, the plaintiff filed a petition in bankruptcy and filed schedule of property alleged to have been converted by the defendants

in the bankrupt court as assets of his estate and that said matter is still pending in said bankrupt court and that said property has never been released by said Court or set apart to the plaintiff in this suit as exempt to him but is *in gremio legis.*"

7. "The defendants for further answer to said complaint saith that the plaintiff in this suit, B. T. Collier, on the 20th day of July, 1906, filed a voluntary petition of bankruptcy in the United States District Court, of Eastern Division of the Northern District of Alabama, a court of competent jurisdiction and that the property alleged to have been converted by the defendants was scheduled in said Court as assets of the estate of the said B. T. Collier, and (add) that said matter is still pending in said court and that said property is still under the jurisdiction and protection of said United States Court."

Defendant in error demurred said plea No. 5, on the grounds, that:

(1) Said 5th plea fails to aver or show that any trustee in bankruptcy has been appointed.

(2) The averment of said plea to the effect that plaintiff filed a petition in bankruptcy and filed a schedule of property, and that the matter is still pending in bankruptcy court, and that said property has never been released by said court or set apart to plaintiff afford no jurisdiction to the defendant for the trespass which is averred in the complaint and not denied in the plea.

(3) The fact that a petition had been filed in bankruptcy and other proceedings had as averred in said plea do not constitute a bar to a suit brought for a trespass alleged in the complaint. The defendant in error filed the same demurrers to the 7th plea, which said demurrers were sustained by said City Court of Gadsden. The plaintiffs in error then filed by leave of the court additional pleas No. 10 and 12.

10. "Defendants for further answer to said complaint saith that on the 20th day of July, 1906, the plaintiff filed a petition in bankruptcy and filed schedule of property alleged to have been converted by the defendants in the bankrupt court as assets of his estate, and that the said B. T. Collier was regularly declared and adjudged to be a bankrupt by the District Court of the United States for the Eastern Division of the Northern District of Alabama, and that said matter is still pending in said bankrupt court and that said property has never been released by said court or set apart to the plaintiff in this suit as exempt to him but is *in gremio legis.*"

And plea No. 12:

12. "The defendants for further answer to said complaint saith that the plaintiff in this suit, B. T. Collier, on the 20th day of July, 1906, filed a voluntary petition of bankruptcy in the United States District Court, of Eastern Division of the Northern District of Alabama, a court of competent jurisdiction, and that the property alleged to have been converted by the defendants was scheduled in said Court as assets of the estate of the said B. T. Collier, and that said B. T. Collier was duly adjudged to be a bankrupt by said court and that said matter is still pending in said court and that said property is still under the jurisdiction and protection of the said United States Court."

The defendant in error demurred said 10th plea on the grounds:

(1) Said 10th plea fails to show that any trustee in bankruptcy had been appointed.

(2) The averment of said plea to the effect that plaintiff filed a petition in bankruptcy, filed schedule of its property, and that Collier was declared and adjudged to be a bankrupt, and that said matter is still pending in bankrupt

court, and that said property has never been released by said court or set apart to the plaintiff as exempt afford no justification to the defendants for the trespass which is averred in the complaint and not denied in the plea.

(3) The fact that a petition has been filed in bankruptcy and other proceedings had, as averred in said plea, do not constitute a bar to a suit brought for the trespass alleged in the complaint. The defendant in error filed the same demurrers to the 12th plea, and the demurrers to pleas 10 and 12 were sustained by the court.

There was a verdict and judgment in favor of the defendant in error for $2,133.17, and on appeal to the Supreme Court of Alabama, this case by a divided court was affirmed, holding that the plaintiffs in error, acting on advice of counsel, in which advice a minority of the Supreme Court of Alabama held was correctly given, that these plaintiffs in error were liable for about $1,000 smart money for the taking and converting of $500 worth of property, and the matter of pleas 5, 7, 10, and 12, and the sustaining of the demurrers thereto by the City Court of Gadsden, was assigned as error and argued orally and by brief in the Supreme Court of Alabama, but which was not mentioned in the opinion rendered by said court, and the plaintiffs in error thereupon sued out a writ of error to this court.

ARGUMENT AND BRIEF.

The plaintiffs in error insist that the Supreme Court of Alabama fell into an error in affirming the decision of the lower Court, sustaining demurrers to pleas 5, 7, 10 and 12, as shown by the assignment of errors numbered from 1 to 10 on pages 56 and 57 of the transcript of the record, and that the Supreme Court of Alabama erred in each particular as set out in said assignments of errors 1 to 10 inclusive.

This action being only in trover and trespass, it was

necessary for the defendant in error to maintain this action to show an immediate right of possession which pleas 5, 7, 10, and 12 show that he was not entitled to. For:

> "To support an action of trover, the right to the property and the possession thereof, or the immediate right of possession, must concur in the plaintiff at the time of the conversion. In order to maintain an action of trespass for the wrongful taking of personal property, the plaintiff must show that he had, at the time of taking, actual possession of the property, or the right of immediate possession."
>
> Johnson vs. Wilson, 137 Ala., 468.

> "To maintain trover the plaintiff must have property in himself, and a right to the possession at the time of the conversion, and must recover on the strength of his own title."
>
> Moore vs. Walker, 124 Ala., 199.

And the same rule applies in trespass.

Cook vs. Thornton, 109 Ala., 523.

> "The remedy of the owner of the goods for the wrongful levy when the goods are *in gremio legis*, if any, is case, and not trespass."
>
> 4 May. Dig. Ala. Rep., 952 (8).
>
> Harmon vs. McRae, 109 Ala., 409.

> "This court has jurisdiction to review the judgment or decree of a State court denying a right, title or immunity, claimed under the bankruptcy act, where such claim was directly presented to and decided by the State Court."
>
> 1 Enc. of U. S. S. C. Rep., 643.

> "Although it does not appear from the opinion of the Court of original jurisdiction, or from the opinion of the highest State Court, that either Court for-

merly passed upon any question of a Federal nature, yet if a necessary effect of the decision was to determine adversely to the plaintiff in error, the rights and immunities claimed by him in the pleadings and proof, under the proceeding in bankruptcy, this Court has jurisdiction to review the decision under revised statutes, Section 709, providing that: 'A final judgment or decree in any suit in the highest Court of a State where any title, right, privilege, or immunity is claimed under the constitution, or any * * * or any authority exercised under the United States, and the decision, is against the title, right, privilege, or immunity specially set up or claimed by either party, under such constitution * * * or authority may be re-examined and reversed or affirmed in the Supreme Court upon a writ of error.'"

(1) Enc. of U. S. S. C. Rep., 644.

This suit being in trespass and trover, the authorities and the Alabama Supreme Court have held that in actions of trespass and trover, such as this, that no recovery could be had when the property was *in gremio legis*, nor when the plaintiff did not have the immediate right to possession, although the legal title might be in him, still the want of legal title will defeat both causes of action, and the Supreme Court of Alabama necessarily held that the putting the property in bankruptcy did not put it within its protection, and that it was not *in gremio legis*, and that the right of possession was in the bankrupt and not in the bankrupt Court or its officers, and therefore the only question that is before this Court is whether pleas 5 and 7 shown on transcript of Record, page 4, and pleas 10 and 12, shown on transcript of Record, page 6, or either of them, made the necessary averments to place the property in the custody, control or possession of the bankrupt Court, or any of its officers, or place the property *in gremio legis;* as the de-

fendant in error by demurring to said pleas admitted the facts therein set forth.

The defendant having specified particular grounds 1, 2, and 3 to pleas 5 and 7 (see transcript of Record, page 5), and 1, 2, and 3 to pleas 10 and 12 (see transcript of Record, page 8), these are the only demurrers that could be considered by the Court.

> "When a demurrer specifies some particular ground it is thereby a waiver of all other grounds."
> 3 May. Dig. Ala. Rep., 11 (71).

> "If pleadings, though defective, are not subject to the particular ground of demurrer assigned, the demurrer should be overruled."
> 3 May. Dig. Ala. Rep., 11 (73).

> "From the time of the adjudication in bankruptcy the bankrupt's property comes into the custody of the bankrupt Court. It is *in custodia legis*. The bankruptcy Court will not permit any person, even though he be an officer of a State Court, acting under its process, to interfere with the possesion or custody by the bankruptcy Court or its officers of the property thus held by it."
> Keegan vs. King, 3 Am. B. Rep., 79.
> Collier on Bank, 6 Ed., 588.

> "The moment, however, that an adjudication of bankruptcy has been made, the title to all the property of the bankrupt as of that date, passes to the person who is subsequently chosen trustee. From the time of the adjudication, the property of the bankrupt is in the custody and under the control of the bankrupt Court. From the time such property, by the adjudication of bankruptcy comes into the custody of the bankrupt Court it is *in custodia legis*."
> Keegan vs. King, 3 Am. B. Rep., 84.

"The property in controversy being in the actual custody and possession of an officer of this Court at the time the suit was brought in the State Court, neither that Court, nor any person acting under any process issued from that Court, can, without the permission of this Court, interfere with it; and to so interfere would be a contempt of the authority of this Court. This principle is thoroughly settled by the Supreme Court of the United States in the cases of Peck v. Jennes, 7 How., 612, 625; Williams v. Benedict, How., 107, 112; Wiswald v. Sampson, How., 52; Peal v. Phipps, 14 How., 368, 374; Taylor v. Carryl, 20 How., 583, 594, 597; Freeman v. Howe, 24 How., 450; Buck v. Colbath, 3 Wall., 334.

"And this is true, even though the property may actually remain in the hands of the bankrupt."

Keegan vs. King, 3 Am. B. Rep., 84.

The title, by the act of adjudication and at the time of adjudication, vested immediately in the trustee to be thereafter appointed, and this under the authorities is fatal to defendant in error's right to recover, and also the declaring of the defendant in error a bankrupt and the scheduling of his property as assets of his estate in the District Court for the United States, a Court of competent jurisdiction put this property *in gremio legis* and the defendant in error could not recover in either trespass or trover, and if he could have recovered at all it would only have been in an action of case wherein he could have only recovered the amount he was damaged, and the jury could not in that event have assessed vindictive damages, or if the property was in the custody, control, or under the protection of the bankrupt Court, and put there by the defendant in error himself, its taking could not be trover or trespass, but if any right of recovery could be had by defendant in error, would be in case for destroying his right

to claim exemptions, if he could have done so, and where the recovery would have been the damage done.

We respectfully submit that for four reasons the defendant in error should not recover for either trover or trespass as claimed in this case.

(1) The adjudication of bankruptcy by a Court of competent jurisdiction, declaring the defendant in error a bankrupt *co instanti* put the title in a trustee thereafter to be appointed.

(2) That the bankruptcy of defendant in error and the scheduling of the property alleged to have been converted in the bankrupt Court put the property *in custodia legis*.

(3) That the property having been placed in the bankrupt Court, it was in *gremio legis*.

(4) That the property was in the possession, control, and custody of the bankrupt Court.

Respectfully submitted,

GEO. D. MOTLEY,
Attorney for Plaintiffs in Error.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 104.

M. B. JOHNSON ET AL., PLAINTIFFS IN ERROR,

vs.

B. T. COLLIER.

ADDITIONAL BRIEF AND ARGUMENT.

The bankrupt himself has no standing in court after adjudication in regard to his property or estate.

Pickens *vs.* Roy, 187 U. S., 177-180.

"The assignment related back to the commencement of the proceeding, which was by filing the petition on the 23d of February, 1875, and the title of the assignee to all the property and effects of the bankrupt became vested as of that date."

Bank *vs.* Sherman, 101 U. S., 403-405.

"Upon the adjudication of a bankrupt, title to his property passes from him at once, and is con-

ditionally vested in the court, pending the appointment of a trustee, or until the estate is finally closed or abandoned by the creditors."

Rand *vs.* Sage, 102 N. W. Rep., 864.

"The filing of a petition in bankruptcy, followed by an adjudication, is a seizure of the property by the law, which is equal in rank to seizure on attachment or execution."

In re Rodgers, 125 Fed. Rep., 169.

And we respectfully submit that necessarily the property was under the protection, control, and custody of the bankrupt court, and that no question of exempt property is involved in the remotest degree, for the statement in plea 10 is that the property had not been set apart as exempt, was an allegation only that the property had not been turned back to bankrupt; and plea 12, to which a demurrer was sustained, made the allegation that they were assets in the bankrupt court, and the defendant in error admitted this to be true when he demurred to this plea. Therefore, the sole and only question is, Did the property alleged to have been converted, being assets in the bankrupt court, prevent their recovery by the bankrupt?

Conceding that the levy under execution by the sheriff was dissolved by bankruptcy, then the question is to whom should the property be delivered by the sheriff; should it be turned over to the bankrupt, or was it the duty of the sheriff to retain the

property and deliver it to the trustee when he should be appointed? Could the bankrupt have maintained suit if he had delivered to the bankrupt court? We insist the asking makes the answer, and shows that it was error to sustain demurrers to each and every plea.

Respectfully submitted,

GEORGE D. MOTLEY,
Counsel for Plaintiff in Error.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 104.

M. B. JOHNSON ET AL., PLAINTIFFS IN ERROR,

vs.

B. T. COLLIER.

BRIEF ON BEHALF OF THE DEFENDANT IN ERROR.

AMOS E. GOODHUE,
Counsel for Defendant in Error.

(21,770.)

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 104.

M. B. JOHNSON ET AL., PLAINTIFFS IN ERROR,

vs.

B. T. COLLIER, DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF ALABAMA.

BRIEF OF AMOS A. GOODHUE ON BEHALF OF DEFENDANT IN ERROR.

Statement of Facts.

This is an action of trespass brought by defendant in error against plaintiffs in error. The complaint alleges the wrongful taking of certain goods and chattels. Plaintiff in error Chandler was the sheriff of Etowah county, Alabama. Plaintiff in error Johnson obtained a judgment against defendant in error Collier and placed a *fieri facias*

in the hands of plaintiff in error Chandler. On the 18th day of July, 1906, Sheriff Chandler, acting under this *fi. fa.*, seized certain goods and chattels as the property of Collier, seeking to subject them to the satisfaction of the *fi. fa.* in his hands. On the 20th day of July, 1906, defendant in error Collier filed a voluntary petition in bankruptcy and scheduled as assets of his estate the goods and chattels that had been levied upon. In due course Collier was adjudicated a bankrupt. No trustee was ever appointed and, so far as this record discloses, no further proceedings were had in the bankruptcy matter. On the 28th day of July, 1906, Collier claimed as exempt to him under the constitution and laws of Alabama the property that had been seized by the sheriff. Under the laws of Alabama it became the duty of the sheriff, when such a claim of exemptions was filed with him, to notify the plaintiff in execution, and, unless the claim is contested within a certain time, to discharge the levy. But the sheriff, at the instigation of Johnson, saw fit to utterly disregard the claim of exemptions and sell the goods and chattels levied on. Thereupon Collier brought the present action of trespass. He recovered judgment in the *nisi prius* court, which was affirmed by the Supreme Court of Alabama. The rulings upon which plaintiffs in error seek to predicate a Federal question are the sustaining demurrers to certain pleas. The pleas are very scant, but the two pleas which most fully and clearly set out

the contention of plaintiffs in error are numbered 10 and 12. These pleas will be found on page 6 of the transcript and are in the following words:

> "10. Defendants for further answer to said complaint saith that on the 20th day of July, 1906, the plaintiff filed a petition in bankruptcy and filed schedule of property alleged to have been converted by the defendant in the bankrupt court, as assets of his estate and that the said B. T. Collier was regularly declared and adjudged to be a bankrupt by the District Court of the United States for the Eastern Division of the Northern District of Alabama, and that said matter is still pending in said bankrupt court and that said property has never been released by said court or set apart to the plaintiff in this suit as exempt to him but is in *gremio legis*.
>
> "12. The defendants for further answer to said complaint saith that the plaintiff in this suit, B. T. Collier, on the 20th day of July, 1906, filed a voluntary petition of bankruptcy in the United States District Court of Eastern Division of the Northern District of Alabama, a court of competent jurisdiction, and that the property alleged to have been converted by the defendants was scheduled in said court as assets of said estate of the said B. T. Collier, and that said B. T. Collier was duly adjudged to be a bankrupt by said court and that said matter is still pending in said court and that said property is still under the jurisdiction and protection of the said United States court."

In the first place, the contention on behalf of defendant in error is that no Federal question is presented by the record.

Williams *vs.* Heard, 140 U. S., 529.
Scott *vs.* Kelly, 22 Wall., 59.

But if this court finds that a Federal question is presented by this record, we respectfully submit that it will find little difficulty in deciding that question adversely to plaintiffs in error. The precise question involved in this case has been decided by the Appellate Court of New York.

Rand *vs.* Iowa Central Railway Company, 186 N. Y., 58.

> "Where no trustee had been appointed, a defendant sued by the bankrupt may not plead that the bankrupt is not the real party in interest."
>
> Remington on Bankruptcy, vol. 1, section 1, 113.
> Rand *vs.* Iowa Central Railway Co., 186 N. Y., 58.
> Gordon *vs.* Mechanics and Traders Ins. Co., 120 La. Ann., 441.

We respectfully submit that the reasoning contained in the opinion of the learned court in the New York case above cited is conclusive.

But this question has been passed upon by the Supreme Court of the United States. It was directly involved in the case of Thatcher *vs.* Rockwell, 105 U. S., 468.

In the case of Thatcher *vs.* Rockwell, cited *supra,* an assignee in bankruptcy had been appointed and therefore the decision in that case goes much further than is required for the purposes of this case. But in such a case, and applying the principle to a case even *after* the appointment of an assignee, this court said:

> "It is no defense to the debt that the creditor has become a bankrupt, and if an assignee, after notice, permits a pending suit to proceed in the name of the bankrupt for its recovery, he is bound by any judgment that may be rendered. This is a sufficient protection for the debtor."

When reference is had to the facts contained in this record it will be seen that plaintiffs in error stand in a peculiar position. They are the sheriff and plaintiff in execution, who have, in spite of an adjudication in bankruptcy and a claim of exemptions, each of which are sufficient to dissolve the levy, ruthlessly proceeded to have the property of the execution debtor seized and sold, although doubly protected by the constitution and statutes of the State of Alabama granting exemptions, on the one hand, and by the Federal law dissolving all levies after adjudication, on the other hand. And yet these same ruthless violators of these legal rights insist here that the property which they seized and sold as the property of Collier, under the guise of process issuing from a State court, was in *gremio legis,* under the protection of

the bankrupt court, incapable of seizure or sale under the process of any other court. They *then* sold it as the property of Collier. They *now* insist it was the property of a trustee that was never appointed. They *then* ruthlessly disregarded the dissolution of the levy accomplished by the adjudication in bankruptcy and disregarded the protection which the Federal court of bankruptcy throws around the property of the bankrupt, and insisted that it was subject to the process of the State court and actually subjected it to this process. They *now* vehemently insist that this same property was sacredly held by the court of bankruptcy and was in *gremio legis*. The authorities hitherto cited in this brief abundantly demonstrate the futility of their contention.

Respectfully submitted,

AMOS E. GOODHUE,
Attorney for Defendant in Error.

17

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ADDITIONAL ARGUMENT AND AUTHORITIES ON BEHALF OF THE DEFENDANT IN ERROR.

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ADDITIONAL ARGUMENT AND AUTHORITIES BY AMOS E. GOODHUE, COUNSEL ON BEHALF OF DEFENDANT IN ERROR.

Johnson and Chandler contend that the State Court had no jurisdiction of the present action and that the sole remedy of Collier was to proceed in the Court of Bankruptcy.

Our answer is, that the pleas, to which demurrers were sustained, were not addressed to the jurisdiction of the State Court, but were pleas in Bar, that invoked the jurisdiction of the State Court to declare that Collier had no cause of action.

But their most earnest contention is, that the right to maintain the action of trespass passed out

of Collier after the seizure of property by the sheriff, and that Collier, having been adjudicated a bankrupt, cannot while the bankruptcy proceedings are pending, successfully prosecute an action of trespass for the unlawful taking of goods seized and taken before bankruptcy.

Here it will be observed that Johnson and Chandler made no application either to the City Court of Gadsden or the Court of Bankruptcy to stay the proceedings until a trustee could be appointed and given an opportunity to determine whether or not it would be to the advantage of the State to intervene in his own name and to prosecute the suit. They filed pleas in Bar, which confessed the wrongful taking and invoked the judgment of the trial court that Collier had no right of action.

Our answer to their contention is three-fold.

First. It clearly appears from this record that the gist of the action tried in the Court below was the ruthless refusal of the sheriff and the execution creditor to allow Collier his exemptions. Let us trace the pleading. The complaint charged a wrongful taking. By their pleas, Johnson and Chandler admitted the taking but pleaded justification under process. Collier by his replications did not deny the process but avoided it by asserting that he had filed with the sheriff a claim of exemptions which the sheriff had wantonly disregarded. Upon the trial, the sheriff did not deny the filing of the claim of exemptions or that he had dis-

regarded it, but insisted that the judgment on which the *fi. fa.* was based was of such a character that no exemptions could be claimed against it. The Supreme Court of Alabama passed on this contention, and as the Supreme Court of the United States had decided in

Lockwood *vs.* Exchange Bank, 190 U. S., 294,

that the title to exempt property did not pass to the trustee, the Alabama Court did not think it necessary to pass on the pleas, now the subject of contention, because, under the undisputed facts, they took the proper and sensible view that such a right of action would not pass out of the bankrupt into any trustee that might thereafter be appointed. And this Court also, applying the familiar rule that a sheriff could not justify under process, which he has abused, held the sheriff a trespasser, *ab initio,* for the taking which had occurred before the bankruptcy of Collier, and while the title was clearly in Collier. We submit it is clear that an action by a bankrupt for actual and punitive damages, brought against a sheriff for wrongfully and wantonly selling exempt property and thereby depriving the bankrupt of his rightful exemption, is plainly a cause of action of which bankruptcy does not divest the bankrupt, and *which does not pass in any event to the trustee.*

But our second answer to this contention is as follows: Johnson and Collier are estopped from

setting up the defense now relied upon. Having seized and sold the property in flagrant defiance of the Court of Bankruptcy, it does not now lie in their mouth to assert that this property was not Collier's but was under the protection and watchcare of the Court of Bankruptcy.

Sessions *vs.* Romadka, 145 U. S., 49.

Our third answer to this contention is this. When no trustee has been appointed the title remains in the bankrupt, and he may maintain the present suit, especially when the facts in the record disclose that the *creditors* and the *Court of Bankruptcy* have abandoned the property or, more properly speaking, *have left the bankrupt to prosecute the action in his own name.*

The levy was made July 18, 1906. The petition in bankruptcy was filed July 20, 1906, and disclosed the existence of the property. It was scheduled and called to the attention of the Court of Bankruptcy. The present action was tried in the City Court of Gadsden in June, 1907. At no stage of these proceedings has any one in any way sought to assert the jurisdiction of the Court of Bankruptcy except the wrongdoers who have taken this property, despite the alleged jurisdiction of the Court of Bankruptcy, and who occupy anomalous position of pleading that the property they sold as Collier's was in fact part of the bankrupt estate and under the sacred and exclusive care of the Court of Bankruptcy.

Under these circumstances we insist that the true view of this case is that the *creditors* and the *Bankrupt Court have not seen fit to accept this suit as assets of the estate subject to the administration of the Court of Bankruptcy, but have seen fit to allow the bankrupt to press this suit either for his own benefit or as a quasi trustee for the benefit of his creditors.*

Remington on Bankruptcy, vol. 3, pp. 228-9, secs. 933-4-5.

Dushane *vs.* Beal, 161 U. S., 513.

To the same effect are cases cited on former brief.

Rand *vs.* Iowa Central Railroad Co., 186 N. Y., 58.

Gordon *vs.* Mechs. and Trad. Ins. Co., 120 La. Ann., 441.

"Until an assignee is appointed and qualified and the conveyance or assignment is made to him the title to the property whatever it may be remains in the bankrupt."

Hampton *vs.* Rouse, 22 Wall., 263.

Conner *vs.* Long, 104 U. S., 228.

Boonville National Bank *vs.* Blakey, 107 Fed. Rep., 891.

Respectfully submitted,

AMOS E. GOODHUE,

Counsel on Behalf of Defendant in Error.

JOHNSON *v.* COLLIER.

ERROR TO THE SUPREME COURT OF THE STATE OF ALABAMA.

No. 104. Argued December 14, 15, 1911.—Decided January 9, 1912.

The bankrupt is not divested of his property by filing a petition in bankruptcy. He is still the owner, holding in trust, pending the appointment and qualification of the trustee, whose title then relates back to the date of adjudication.

Until the election of the trustee, the bankrupt may institute and maintain a suit on any cause of action possessed by him.

161 Alabama, 204, affirmed.

M. B. JOHNSON, as executor, recovered judgment against B. T. Collier, in the City Court of Gadsden, Ala. Execution thereon was levied July 20, 1906, on certain personal property.

Under a provision of the Alabama statute, Collier immediately filed with the sheriff a claim of exemption. On the same day he filed, in the proper District Court of the United States, a voluntary petition in bankruptcy, including this property in his schedule of assets. Notwithstanding the claim of exemption, the sheriff sold the property at public outcry on July 30, 1906.

Thereafter, on a date not shown by the record, Collier was adjudicated a bankrupt. On August 8, 1906, before a trustee was elected, he brought suit against both Johnson and the sheriff for damages, on the theory that the sale of the property after the filing of the claim of exemption made them trespassers *ab initio*. The defendants filed a plea, in which they set up the pendency of the bankruptcy proceedings, and alleged that Collier had no title to the cause of action which was in *gremio legis* until the election of the trustee, and for that reason he could not maintain a suit

for damages occasioned by the unlawful sale of property included in the schedule of assets. A demurrer to this plea was sustained. The jury found a verdict in favor of Collier, which the trial court refused to set aside. This ruling was affirmed, and the case is here on writ of error from that judgment of the Supreme Court of Alabama.

Mr. George D. Motley for plaintiffs in error.

Mr. Amos E. Goodhue for defendant in error.

Mr. Justice Lamar, after making the foregoing statement, delivered the opinion of the court.

The trustee, with the approval of the court, may prosecute any suit commenced by the bankrupt prior to the adjudication. (§ 11, c.) But the statute is otherwise silent as to the right of the bankrupt himself to begin a suit in the time which intervenes between the filing of the petition and the election of the trustee. There is a conflict in the conclusions reached in the few cases dealing with this question. *Rand* v. *Sage*, 94 Minnesota, 344; *Rand* v. *Iowa Central R. Co.*, 186 N. Y. 58; *Gordon* v. *Mechanics' Insurance Co.*, 120 Louisiana, 441.

While for many purposes the filing of the petition operates in the nature of an attachment upon choses in action and other property of the bankrupt, yet his title is not thereby divested. He is still the owner, though holding in trust until the appointment and qualification of the trustee, who thereupon becomes "vested by operation of law with the title of the bankrupt" as of the date of adjudication. (§ 70.)

Until such election the bankrupt has title—defeasible, but sufficient to authorize the institution and maintenance of a suit on any cause of action otherwise possessed by him. It is to the interest of all concerned that this should be so.

There must always some time elapse between the filing of the petition and the meeting of the creditors. During that period it may frequently be important that action should be commenced, attachments and garnishments issued, and proceedings taken to recover what would be lost if it were necessary to wait until the trustee was elected. The institution of such suit will result in no harm to the estate. For if the trustee prefers to begin a new action in the same or another court in his own name, the one previously brought can be abated. If, however, he is of opinion that it would be to the benefit of the creditors, he may intervene in the suit commenced by the bankrupt, and avail himself of rights and priorities thereby acquired. *Thatcher* v. *Rockwell*, 105 U. S. 467.

If, because of the disproportionate expense, or uncertainty as to the result, the trustee neither sues nor intervenes, there is no reason why the bankrupt himself should not continue the litigation. He has an interest in making the dividend for creditors as large as possible, and in some States the more direct interest of creating a fund which may be set apart to him as an exemption. If the trustee will not sue and the bankrupt cannot sue, it might result in the bankrupt's debtor being discharged of an actual liability. The statute indicates no such purpose, and if money or property is finally recovered, it will be for the benefit of the estate. Nor is there any merit in the suggestion that this might involve a liability to pay both the bankrupt and the trustee. The defendant in any such suit can, by order of the bankrupt court, be amply protected against any danger of being made to pay twice. *Rand* v. *Iowa Central R. Co.*, 186 N. Y. 58; *Southern Express Co.* v. *Connor*, 49 Georgia, 415.

There was no error in holding that the bankrupt had title to the cause of action and could institute and maintain suit thereon.

Affirmed.